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# Justice-as-Fairness as Judicial Guiding Principle: Remembering John Rawls and the Warren Court

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# Justice-as-Fairness as Judicial Guiding Principle

## REMEMBERING JOHN RAWLS AND THE WARREN COURT

*Michael Anthony Lawrence*<sup>†</sup>

“I am glad to be going to the Supreme Court because now I can help the less fortunate, the people in our society who suffer, the disadvantaged.”<sup>1</sup>

### INTRODUCTION

Seventeen individuals have served as Chief Justice of the U.S. Supreme Court since the Constitution’s ratification in 1789. The decade-and-a-half period when Earl Warren served as the fourteenth Chief Justice (1953-1969) was marked by numerous landmark rulings in the areas of racial justice, criminal procedure, reproductive autonomy, First Amendment freedom of speech, association, and religion, voting rights, and more. These decisions led to positive, fundamental changes in the lives of millions of less advantaged Americans who had been historically disfavored because of their race, nationality, gender, socioeconomic class, or political views. The legacy of the Warren Court is one of an institution committed to “a dedication in the law to the timeless ideals of ‘human dignity, individual rights, and fair play, and [a] recognition that the best of us have no more rights or freedoms than the worst of us.’”<sup>2</sup> For its efforts, the

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<sup>1</sup> ED CRAY, *CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN* 255 (1997).

<sup>2</sup> Harry N. Scheiber, *The Warren Court, American Law, and Modern Legal Cultures*, in *EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW* 1, 26 (Harry N. Scheiber ed., 2007) [hereinafter *EARL WARREN AND THE WARREN COURT*].

Warren Court is considered by some to be the greatest high court in the nation's history.<sup>3</sup>

At the same time, many Warren Court decisions were hugely controversial, upsetting the settled expectations of those who benefited from long-entrenched governmental biases and practices. The ubiquitous "Impeach Earl Warren" billboards seen throughout the countryside during the late 1950s and the 1960s reflected the underlying efforts of laissez-faire conservatives to overturn aspects of the New Deal, which began a quarter century earlier.<sup>4</sup> The intensity of the political opposition to the Court's newfound commitment to fairness and equality was matched only by the infamous pre-Civil War *Dred Scott* case a full century earlier.<sup>5</sup> To this day and through the decades, conservative jurists, academics, and others have bemoaned the Warren Court's "lawlessness" and lack of principle.<sup>6</sup>

Ultimately, such criticisms proved wanting. By demonstrating a consistent concern for the plight of less advantaged, less favored members of American society, the Warren Court was, to the contrary, *highly* principled in exercising its full powers to achieve fairness and equal protection for all, regardless of a person's status in society. We should demand nothing less from government, which exists, after all, to serve the people—all the people.

The Warren Court's practice of using its power of equity to achieve fair outcomes closely resembles, at its core, the "justice-as-fairness" approach promoted in John Rawls's monumental 1971 work, *A Theory of Justice*.<sup>7</sup> At its simplest, Rawls suggested that in order to achieve a just (or "fair") society, decision-makers should operate from the original position of equality behind a so-called veil of ignorance, where they have no idea of their own personal circumstances, in order to promote a just society. If the individual decision-maker herself knows she *might* be among the persons most negatively affected by a proposed or possible decision, she is much more likely—operating in her own self-interest—to "hedge her bets" and make a decision that is fair to all. By applying this approach, the interests of less advantaged, more vulnerable members of society are adequately considered,

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<sup>3</sup> See *infra* Section II.A.2.

<sup>4</sup> Scheiber, *supra* note 2, at 19.

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 847-48 (2007) (citing ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 120 (1975)); Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 145 (1964).

<sup>7</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

promoting the justice-as-fairness principle of equal opportunity for all, including the least privileged.

Of course, Earl Warren and the Warren Court did not adopt justice-as-fairness reasoning *per se*, since Rawls had not yet published *A Theory of Justice* by the time Warren left the Court in 1969. Nonetheless, principles of fairness and equal opportunity underlie both the Warren Court's jurisprudence and Rawls's theory of justice.<sup>8</sup> Not incidentally, the same core principles guide notions of public virtue,<sup>9</sup> a concept vital to the founding generation, and the Golden Rule's ancient mandate, long recognized by all of the world's major religious and moral authorities as to "do unto others as you would have them do unto you."<sup>10</sup> This article proposes that judicial adherence to the core principles expressed in these various sources would result in a markedly more just society—which should be the ultimate goal for any legitimate system of justice.

This article is divided into three parts. Part I explains John Rawls's justice-as-fairness theory and how it has resonated in legal and constitutional theory. Part II discusses the Warren Court's equity-based jurisprudence and its profound impact on creating a more just America. This part also discusses the constitutional bases for the Warren Court's decisions, principally with respect to the Fourteenth Amendment's Equal Protection and Due Process Clauses. Part III then discusses the Warren Court's legacy and how its jurisprudence embraced broader concepts of human rights and public virtue. The article concludes by suggesting that the essentially Rawlsian justice-as-fairness approach could serve as a useful normative ideal for judicial decisionmaking.

## I. JOHN RAWLS'S *A THEORY OF JUSTICE*

The year 1971 marked the publication of *A Theory of Justice*<sup>11</sup> by political philosopher John Rawls.<sup>12</sup> *A Theory of Justice* "is a modern classic . . . [I]ts impact on contemporary legal

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<sup>8</sup> Perhaps the timing of Rawls's book, written as it was at essentially the same time as Earl Warren wrapped up his Chief Justiceship, indicates that Rawls was influenced by the Warren Court's jurisprudence.

<sup>9</sup> See *infra* Section III.B.2.

<sup>10</sup> The Golden Rule dates to antiquity. Homer identified the idea: "Welcome the coming, speed the parting guest!" See HOMER, *THE ODYSSEY* 31 (Robert Fagles trans., Penguin Books 1997).

<sup>11</sup> RAWLS, *supra* note 7.

<sup>12</sup> Rawls is considered for his work on *A Theory of Justice* and subsequent publications to be "the most important political philosopher of the twentieth century" by many. Luke M. Milligan, *A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process*, 87 B.U. L. REV. 1177, 1180 (2007).

thinking has been profound," writes one legal scholar.<sup>13</sup> Widely cited in law review articles and court opinions, the book has provided a unifying approach for many theorists and jurists seeking to elevate basic fairness as an integral component of any concept of justice.<sup>14</sup>

Political philosophers are similarly laudatory. "[P]olitical philosophers now must either work within Rawls' theory or explain why not,"<sup>15</sup> says one. Another adds, "[f]or us in late twentieth century America, . . . [Rawls's approach] 'is our vision, the theory most thoroughly embodied in the practices and institutions most central to our public life.'"<sup>16</sup> More broadly, Rawls's work has permeated American society at large, much of which is sympathetic to the basic thesis that "justice is fairness."<sup>17</sup>

Rawls himself explained that his purpose in writing *A Theory of Justice* was to offer an alternative framework for the concept of "justice" that was superior to the utilitarian approaches that had dominated for the past several centuries and had operated largely to the detriment of more egalitarian systems of justice.<sup>18</sup> Specifically, "the animating philosophical idea in *A Theory of Justice* is that utilitarianism does not take rights seriously, and that not taking rights seriously is a grave defect, so we need a theory of justice that better fits our core convictions about ways people must not be treated."<sup>19</sup>

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<sup>13</sup> Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549, 550 (1994).

<sup>14</sup> *Id.*; see also Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2 n.4 (1999) ("[Rawls's] theory has been widely discussed, criticized, and applied in diverse scholarly legal and philosophical circles." (citations omitted)); Stephen M. Griffin, *Reconstructing Rawls's Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715, 776 (1987) (stating that "[s]urely one of the reasons for the enthusiastic reception of Rawls's theory among legal scholars is that it was perceived as a theory that justified many aspects of the American constitutional tradition").

<sup>15</sup> Milligan, *supra* note 12, at 1180 (quoting ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 183 (1974)).

<sup>16</sup> Jesse Furman, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L.J. 1197, 1200 (1997) (quoting Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 82 (1984)); see also Stephen M. Griffin, *Political Philosophy Versus Political Theory: The Case of Rawls*, 69 CHI.-KENT L. REV. 691, 691 (1994) (rebutting some political theorists who criticized Rawls's theory as irrelevant to the real world of politics).

<sup>17</sup> Milligan, *supra* note 12, at 1180; see also Peter F. Lake, *Liberalism Within the Limits of the Reasonable Alone: Developments of John Rawls' Political Philosophy, Its Political Positivism, and the Limits on Its Applicability*, 19 VT. L. REV. 603, 603-05 (1995) (stating that Rawls "set in motion a powerful and inspirational force . . . *A Theory of Justice* . . . [provides an] alternative to various forms of utilitarianism, including . . . law and economics").

<sup>18</sup> RAWLS, *supra* note 7, at xviii.

<sup>19</sup> Richard J. Arneson, *Rawls Versus Utilitarianism in the Light of Political Liberalism*, in *THE IDEA OF A POLITICAL LIBERALISM: ESSAYS ON RAWLS* (Victoria Davion & Clark Wolf eds., 2000). *But see* Michael I. Swygert & Katherine Earle Yanes, *A Unified*

To that end, Rawls sought to further develop social contract theory as originally conceived by the Enlightenment theorists John Locke, Jean-Jacques Rousseau, and Immanuel Kant.<sup>20</sup> To Rawls, the social contract requires that certain principles of justice, premised on basic fairness, be applied to society's institutions to determine whether those institutions are just. Society's institutions establish the basic rules regulating civil and criminal procedure, property, the market economy, and the family.<sup>21</sup>

#### A. *Justice-as-Fairness*

Rawls's *A Theory of Justice* identifies social justice as that which exists in an ideal society where individual citizens engage with each other on the egalitarian bases of mutual respect and cooperative reciprocity.<sup>22</sup> Rawls explains that "justice as fairness [is] a theory of justice that generalizes and carries to a higher level of abstraction . . . the [concept of] social contract."<sup>23</sup> At its root, the theory posits an initial position of equality which is "designed to lead to an original agreement on principles of justice."<sup>24</sup>

This justice-as-fairness formulation is composed of two core principles: first, "equal basic liberty,"<sup>25</sup> and second, the principle combining "fair equality of opportunity" and the "difference principle."<sup>26</sup> These are principles that reasonable, free people,

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*Theory of Justice: The Integration of Fairness into Efficiency*, 73 WASH. L. REV. 249, 251 (1998) (suggesting that justice as fairness and utilitarianism are in fact reconcilable because "justice as [fairness] and justice as efficiency [utilitarianism] both theoretically result from a consensus. Although each model has its own conditions for bargaining, these rules can be selectively combined into a single model" (footnote omitted)).

<sup>20</sup> RAWLS, *supra* note 7, at xviii; see also Samuel Freeman, *Introduction: John Rawls—An Overview*, in THE CAMBRIDGE COMPANION TO RAWLS 6-9 (Samuel Freeman ed., 2003) (relating Rawls's theory to Lockean and Kantian thought); S.A. Lloyd, *Relativizing Rawls*, 69 CHI-KENT L. REV. 709, 735 (1994) (arguing that Rawls's body of work withstands criticisms of failing to consider accepted philosophical methods of argument); Griffin, *supra* note 14, at 727-28 (explaining Rawls's suggestion that determining what is fair in everyday life requires "considering the justice of the basic structure [of society and the social contract] itself" (quoting John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 551 (1980))).

<sup>21</sup> Freeman, *supra* note 20, at 3.

<sup>22</sup> Responding to critics of Rawls who claim the theory attempts to "level" all people, it is the notion of cooperative reciprocity and mutual respect, "not the ideal of redressing undeserved inequalities of welfare, resources, or luck, that is at the foundation of Rawls's view." Freeman, *supra* note 20, at 9; see also Nancy Perkins Spyke, *The Instrumental Value of Beauty in the Pursuit of Justice*, 40 U.S.F. L. REV. 451, 461 (2006) (stating that while "Rawls modified his theory, . . . he never wavered from the ideals of reciprocity and mutual respect").

<sup>23</sup> RAWLS, *supra* note 8, at 3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 53; see *infra* note 29 and accompanying text.

<sup>26</sup> RAWLS, *supra* note 7, at 53; see *infra* notes 33-34 and accompanying text.

looking out for their own interests "would accept in an *initial position of equality*" with others.<sup>27</sup> Taken together, Rawls explains, the principles advance "values of equal protection and civil liberty; fair equality and opportunity; social equality and reciprocity."<sup>28</sup>

Under the first principle of equal basic liberty, "each person is to have an equal right to the most extensive scheme of basic liberties compatible with a similar scheme of liberties for others."<sup>29</sup> In this context, basic liberties include, in addition to political liberty, "freedom of speech and assembly; liberty of conscience and freedom of thought, freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure."<sup>30</sup>

Notably, in its attempts to draw constitutional parameters for democratic government, Rawls's first principle resembles J.S. Mill's principle of liberty.<sup>31</sup> Like Mill's "harm principle"—which states that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others"<sup>32</sup>—Rawls's conception of an expansive set of basic liberties captures the sentiment famously expressed by U.S. Supreme Court Justice Louis Brandeis in 1928, "The makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>33</sup>

<sup>27</sup> RAWLS, *supra* note 7, at 10 (emphasis added).

<sup>28</sup> Milligan, *supra* note 12, at 1202 (quoting JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 189-90 (Erin Kelly ed., 2001)).

<sup>29</sup> RAWLS, *supra* note 7, at 53.

<sup>30</sup> *Id.*; see also Freeman, *supra* note 20, at 4 ("Freedom and integrity of the person" includes "freedom of movement, occupation, and choice of careers, and a right to personal property."); Milligan, *supra* note 12, at 1201-02 (stating that Rawls's basic liberties are "the principles that all parties at the original position can agree are necessary for political justice; they tend to include, among others, freedom of religion and the protection of one's physical integrity" (footnote omitted)).

<sup>31</sup> Freeman, *supra* note 20, at 4. Basic liberties do not include such matters as the "freedom to enter contracts of all kinds, to own weapons, or to accumulate, use, and dispose of productive resources as one pleases." *Id.*

<sup>32</sup> JOHN STUART MILL, ON LIBERTY 13 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859) ("[There is but] one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, . . . that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.").

<sup>33</sup> *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).

The second principle states that “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage [fair equality of opportunity], and (b) attached to positions and offices open to all [difference principle].”<sup>34</sup> In other words, social primary goods (such as wealth, income, opportunity, and liberty) may be distributed unequally only if such distribution advantages the least favored.<sup>35</sup> The difference principle has been especially controversial, largely because of this last part—that inequalities are tolerated only insofar as they advantage the least favored. Some have characterized the difference principle’s staunchly-egalitarian approach as overly radical.<sup>36</sup> Others respond that the second principle in fact seeks to provide equal *opportunities* for all, which would not actually result in radical redistributions.<sup>37</sup>

Under Rawls’s hypothetical “original position of equality,” people should imagine themselves in an unknowing state when making decisions affecting other people—that is, they should imagine themselves as operating from behind a “veil of ignorance.”<sup>38</sup> No one knows one’s own social status, wealth, intelligence, fortune, natural skill, and the like.<sup>39</sup> Indeed, the decision-maker may be among the least advantaged and least fortunate. Because “no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.”<sup>40</sup> In such a scenario, decision-makers who do not know how they themselves are situated with respect to a given matter will be more likely to make decisions that are fair to all, including the least privileged.<sup>41</sup>

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<sup>34</sup> RAWLS, *supra* note 7, at 53, 87; see also Wenar, Leif, John Rawls (*Stanford Encyclopedia of Philosophy/Winter 2013 Edition*), STAN. ENCYCLOPEDIA PHIL. (Sept. 24, 2012), plato.stanford.edu/archives/win2013/entries/rawls [http://perma.cc/4VVK-37KM] (paraphrasing Rawls’s two principles).

<sup>35</sup> See Lawrence B. Solum, *To Our Children’s Children’s Children: The Problems of Intergenerational Ethics*, 35 LOY. L.A. L. REV. 163, 182 (2001). Rawls supplements the theory with two priority rules: “Priority of Liberty” (wherein the first principle of equal political liberty takes priority over the second principle of socioeconomic equality) and “Priority of Justice over Efficiency and Welfare.” *Id.* at 180-81; Freeman, *supra* note 20, at 5.

<sup>36</sup> Griffin, *supra* note 14, at 739.

<sup>37</sup> *Id.* at 739, 740, 742 (stating that “[t]he second principle of justice . . . reduce[s] inequalities resulting from social circumstances and natural endowment . . . not by restricting the natural endowment of the more favored, but by improving the circumstances of those less favored by employing the talents of all in a system of mutual benefit”).

<sup>38</sup> RAWLS, *supra* note 7, at 11.

<sup>39</sup> *Id.* They are allowed to know, however, that they are “heads of families and as such are interested in their families’ share of primary social goods.” April L. Cherry, *Social Contract Theory, Welfare Reform, Race, and the Male Sex-Right*, 75 OR. L. REV. 1037, 1057 (1996).

<sup>40</sup> RAWLS, *supra* note 7, at 11.

<sup>41</sup> Reasonable minds will differ regarding what is adequate consideration for the least privileged. Some would require more, others less. This article suggests that the



## B. *Rawls and the Constitution*

Since its unveiling in 1971, Rawls's justice-as-fairness theory has received copious attention across disciplines, including law.<sup>42</sup> Since any legal discussion inevitably traces back to the Constitution, it is appropriate to consider justice-as-fairness in constitutional terms.<sup>43</sup>

Rawls stated, "The historical experience of democratic institutions and reflection on the principles of constitutional design suggest that a practicable scheme of liberties can indeed be found."<sup>44</sup> Principles of constitutional design protect certain liberties (primarily through the Bill of Rights and Fourteenth Amendment in the United States); however, longstanding constitutional practice has developed a "practicable scheme" whereby those liberties are, while protected, not absolute. Rawls accepts that some limits on basic constitutional rights are acceptable to the extent that those limits fit within a larger coherent rights framework. For example, "[r]ules of order and 'time, place, and manner' regulations are all appropriate. Rights

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consideration should provide, at a minimum, subsistence support allowing the least privileged to enjoy a life of basic human dignity. In later years, Rawls published several additional works, including *Political Liberalism* (1996) and *Justice as Fairness: A Restatement* (2001), which largely responded to criticisms of various aspects of *A Theory of Justice*. Some of the more recent legal commentary assessing Rawls's subsequent work describes a theory that is arguably considerably less robust than that originally envisioned in *A Theory of Justice*. See, e.g., Frank I. Michelman, *Rawls on Constitutionalism and Constitutional Law*, in *THE CAMBRIDGE COMPANION TO RAWLS* 398 (2003) (suggesting that under Rawls's revised theory, such matters as providing basic governmental structure or securing core liberties may be resolved through a process of judicial review within constitutional law, but that other matters, such as the operation of difference principles, would instead be resolved through the political process). But see, e.g., George Klosko, *Rawls's Argument from Political Stability*, 94 COLUM. L. REV. 1882-83 (1994) (stating that even after Rawls's subsequent works, "certain fundamental ideas [are still] seen as implicit in the public political culture of a democratic society").

<sup>42</sup> See *supra* notes 12-18 and accompanying text; see also, e.g., Elizabeth A. Pendo, *Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination*, 77 ST. JOHN'S L. REV. 225, 235 (2003) (stating, "Rawls is often cited in legal literature, and legal scholars have applied his methodology to a wide range of issues including welfare rights, tax policy, campaign finance, and employment discrimination law" (footnote omitted)).

<sup>43</sup> Rawls suggested:

The constitution is not what the Court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say it is. A particular understanding of the constitution may be mandated to the Court by amendments, or by a wide and continuing political majority, as it was in the case of the New Deal.

JOHN RAWLS, *POLITICAL LIBERALISM* 237-38 (1993); see also Bruce A. Antkowiak, *Saving Probable Cause*, 40 SUFFOLK U. L. REV. 569, 605 (2007) (quoting and discussing Rawls's commentary on the Constitution).

<sup>44</sup> John Rawls, *The Basic Liberties and Their Priority*, *The Tanner Lectures on Human Values* at the University of Michigan (Apr. 10, 1981), [http://tannerlectures.utah.edu/\\_documents/a-to-z/r/rawls82.pdf](http://tannerlectures.utah.edu/_documents/a-to-z/r/rawls82.pdf) [<http://perma.cc/N5L7-SKM3>].

may also be restricted, which is to say they may be limited for the purpose of securing an even more extensive system of rights.”<sup>45</sup>

### 1. Rawls Applied

Scholars have applied Rawls’s justice-as-fairness approach to a variety of legal topics. Criminal law and procedure, for example, lend themselves well to Rawlsian analysis. This area of law—the process for trying defendants and punishing convicted offenders—involves the most serious and intrusive exercises of governmental power vis-à-vis the individual citizen. If the criminal justice system’s legitimacy is to be accepted, citizens must believe the system is in fact fair and just. This raises a conundrum, however, “[f]or wouldn’t any citizens, finding themselves convicted of crimes and facing punishment, simply withhold their agreement as to the just and fair nature of the contemplated penalty, whatever its character?”<sup>46</sup>

Rawlsian analysis helps resolve this difficulty by allowing us to evaluate a penalty as measured against Rawls’s two principles of justice in order to understand its underlying values. “The role of a political conception of justice . . . is not to say exactly how these questions are to be settled, but to set out a framework of thought within which they can be approached.”<sup>47</sup> In other words, while Rawlsian analysis may not answer the question of what the law should say, it at least offers an approach for assessing what the law actually does say.

This Rawlsian analysis has been applied in a number of other legal contexts as well. For example, Rawlsian principles are helpful in discussing matters of intergenerational justice. Traditional social contract theory encounters difficulty when applied to justice between generations, since it is problematic to suggest that the yet unborn are able to “consent” in any meaningful way to the terms of any particular agreement or arrangement. By contrast, the very abstractness of Rawls’s original position analysis allows it to circumvent the sorts of knotty issues raised in this context by traditional social contract theory.<sup>48</sup>

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<sup>45</sup> Griffin, *supra* note 14, at 764. According to Griffin, “Rawls envisions two sorts of cases: restrictions on the rights of political participation to protect other rights . . . , and restrictions of an emergency nature necessary to protect the entire system of rights in time of war or other constitutional crisis. Both cases are familiar enough in our constitutional law.” *Id.*; see also Freeman, *supra* note 20, at 5 (“[B]asic liberties can be limited only for the sake of maintaining other basic liberties.”).

<sup>46</sup> Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 314 (2004).

<sup>47</sup> JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 12 (Erin Kelly ed., 2001).

<sup>48</sup> Solum, *supra* note 35, at 207-08; see also Lawrence Zelenak, *Does Intergenerational Justice Require Rising Standards of Living?*, 77 GEO. WASH. L. REV. 1358,

Intergenerational justice also implicates matters of the environment and sustainability. One may usefully extend the veil of ignorance hypothetical to the issue of intergenerational resource conservation.

[W]here members of society are ignorant about which generation they would be born into, they would in the original position, agree upon rules that ensure a condition of "permanent livability;" one that assures that sufficient resources are available for the sustenance of each succeeding generation.<sup>49</sup>

It only stands to reason that when people begin to think more carefully about how they might personally be affected in the future by present-day harmful environmental practices, they will be more likely to support efforts to ameliorate the damage today. For instance, regarding foreign policy, including self-defense and the state, from behind the veil of ignorance, we can consider whether preemptive strikes may be justified in the face of potentially imminent attacks.<sup>50</sup>

Another area where Rawlsian analysis proves helpful is in assessing the law's fairness, over time, to women.<sup>51</sup> Even a cursory inquiry exposes the failure of the U.S. constitutional regime to provide for gender equality over the past two centuries.<sup>52</sup> While gender equality has markedly improved over

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1363 (2009) (stating that according to Rawls's just savings principle, "[e]ach generation must . . . put aside in each period of time a suitable amount of real capital accumulation" (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 285 (1971))); see, e.g., Dawn C. Nunziato, *Justice Between Authors*, 9 J. INTELL. PROP. L. 219, 222 (2002) ("Regulated by a principle of intergenerational savings [in copyright law], individual[] [authors] within each generation are obliged to forgo immediate gains that are available to them where necessary to protect the interests of future generations.").

<sup>49</sup> Alhaji B.M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 GEO. INT'L ENVTL. L. REV. 21, 42 (2003).

<sup>50</sup> Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 466 (2008) (asking, rhetorically, "Behind the veil of ignorance, would not we all agree to limited, humane preemptive strikes for the safety of all?" (quoting Stephen J. Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265, 296 (1999))).

<sup>51</sup> *A Theory of Justice* has been criticized for its insensitivity to gender concerns. "[I]n 1971, [Rawls] did not explicitly list gender as one of the unknowns behind the veil of ignorance." Catherine Powell, *Lifting our Veil of Ignorance: Culture, Constitutionalism, and Women's Human Rights in Post-September 11 America*, 57 HASTINGS L.J. 331, 338 (2005); see also Marion Smiley, *Democratic Citizenship v. Patriarchy: A Feminist Perspective on Rawls*, 72 FORDHAM L. REV. 1599, 1601-02 (2004) (identifying feminist concerns as "first, that that the methodology underlying Rawls's Original Position—individuation and abstraction—privileges men over women by undermining the values of care and relationship; second, that individuals behind the Veil of Ignorance cannot produce principles of justice that are powerful enough to challenge the patriarchal family; and third, that Rawls's insistence on a Veil of Ignorance takes away from black women and other women of color in particular the racial and cultural identities necessary to both their moral agency and their personal integrity" (footnotes omitted)).

<sup>52</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (Justice Ginsburg, writing for the Court, stated that "[t]hrough a century plus three decades and

the past 40 years, work still remains to be done. This work is aided by approaching gender questions from behind a Rawlsian veil of ignorance, where male and female decision-makers are unaware of their gender, and therefore protect, in their own self-interest, the interests of the less privileged (female) class—in case they themselves happen to be among the disadvantaged class.<sup>53</sup>

## 2. Judicial Review

How does the doctrine of judicial review fare under Rawlsian analysis? Since the early days of the Republic, as enunciated first by Chief Justice John Marshall in *Marbury v. Madison*,<sup>54</sup> judicial review—the judiciary's review of the actions of the equal, elected legislative and executive branches—has become an indispensable feature of American constitutionalism.<sup>55</sup> Even so, in principle, judicial review is controversial. It arguably offends basic democratic principles for an unelected group of judges to be able to override the actions of duly elected legislative

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more of [our nation's] history, women did not count among voters composing 'We the People'; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any 'basis in reason' could be conceived for the discrimination." (footnote omitted) (citation omitted)).

<sup>53</sup> Powell, *supra* note 51, at 338 (stating that "the principles selected behind a veil of ignorance would be more consistent with CEDAW [Convention on the Elimination of All Forms of Discrimination Against Women] than the sex equality paradigm that has developed through judicial interpretation of the U.S. Constitution"). While Rawls himself was agnostic on the topic of abortion, "he nonetheless left behind a coherent theoretical model with which to analyze the justness of policy determinations." Milligan, *supra* note 12, at 1181. Regarding other possible topical areas, "[S]ome . . . have argued that disability fares well under a Rawlsian analysis because, similar to the decision makers in the original position, no one knows if or when he or she might become disabled . . ." Pendo, *supra* note 42, at 244; see also Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151, 154-55 (2012) (explaining Rawlsian analysis in the context of international investment treaty practices, commenting that negotiating states "are moving closer to the 'original position'").

<sup>54</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>55</sup> The doctrine of judicial review is regarded by some as nothing short of America's greatest contribution to constitutional theory. As Professor Bickel puts it,

*Marbury v. Madison* . . . exerts an enormous magnetic pull. It is, after all, a great historic event, a famous victory; and it constitutes, even more than victories won by arms, one of the foundation stones of the Republic. It is hallowed. It is revered. If it had a physical presence, like the Alamo or Gettysburg, it would be a tourist attraction; and the truth is that it very nearly does have and very nearly is.

ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 74 (1962); see also Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 5 (2003) (stating, "*Marbury* not only represents the fountainhead of judicial review, but also furnishes the canonical statement of the necessary and appropriate role of courts in the constitutional scheme").

and executive officials. Many have expressed this concern, including Judge Learned Hand, who vocally favored democratic institutions and principles over the "countermajoritarianism" inherent in America's practice of broad judicial review.

[I]t would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs.<sup>56</sup>

On the other hand, there are ample reasons why the Constitution subjects majoritarian democracy to judicial review. Courts are able to give more protection to disfavored individuals or minorities who, by definition, are not well represented in a majoritarian political process. Moreover, judicial review is able to protect core principles and lasting values that might tend to get lost or minimized in the heat-of-the-moment intensity of political conflict.<sup>57</sup> Judicial review offers, in short, an important check on majorities that would, whether because of their own inherent biases, reactionary political responses, or any other reason, oppress minorities.

Indeed, the Founders themselves were well aware of the perils of leaving the people's liberties to the whims of direct and elected majorities. James Madison, arguing in support of the passage of the Bill of Rights before the First Congress, said, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the [l]egislative or [e]xecutive [branches]."<sup>58</sup> In a letter to a French correspondent, Thomas Jefferson averred, "[t]he laws of the land, administered by upright Judges, would protect you from any exercise of power unauthorized by the Constitution of the United States."<sup>59</sup> And Alexander Hamilton commented, in *Federalist* 78, as paraphrased by Rebecca Brown, that "the judiciary was entrusted with the primary responsibility for guarding the value

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<sup>56</sup> LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958); see also BICKEL, *supra* note 55, at 18 ("[N]othing . . . can alter the essential reality that judicial review is a deviant institution in the American democracy.").

<sup>57</sup> Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565, 572-73 (1996) (stating that "courts will be a great deal firmer and wiser than legislatures in interpreting constitutional guarantees which protect essential liberty"); see also Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197 (1952) ("The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed.").

<sup>58</sup> 1 ANNALS OF CONG. 439 (Joseph Gales ed., 1834).

<sup>59</sup> 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 259-60 (1924) (quoting Jefferson, VIII, letter to Archibald H. Rowan, Sept. 26, 1798).

that underlay the entire constitutional structure: The courts were expected to commit to 'inflexible and uniform adherence to the rights of the Constitution, and of individuals . . . .'<sup>60</sup> Such statements by Madison and Hamilton, primary architects of the U.S. Constitution and principle authors of the *Federalist Papers*—not to mention statements by Jefferson, primary draftsman of the Declaration of Independence—demonstrate judicial review's strong pedigree within the American constitutional tradition.

Under Rawlsian analysis, the doctrine of judicial review is neither inherently favored nor disfavored. In Rawls's view, the legitimacy of any governmental system—whether it involves pure majority rule, a more complex constitutional system with legislative, executive, and judicial branches, or some other arrangement—ultimately depends on whether the system provides adequate protections for the principles of equal basic liberty and fair equality of opportunity described in the justice-as-fairness formulation.<sup>61</sup>

One thing that *is* possible to say about a Rawlsian perspective of judicial review is that it views the judiciary as better suited than the legislature to effectuate a fair outcome approximating that which would be achieved if decided from behind a veil of ignorance. Whereas legislative efforts would likely involve complicated formulations and exceptions that would test even the most able legislature, constitutional equal protection and due process analysis lends itself more easily to an inquiry into basic fairness. Judges are sworn to act impartially and fairly in the administration of justice—the very same sorts of behaviors required of those who would act from behind a Rawlsian veil of ignorance.<sup>62</sup>

In sum, Rawls's theory provides strong support for the legitimacy of judicial review within the U.S. constitutional system. Whatever means best accomplish the end of protecting equal liberty and fair equality of opportunity—including judicial review—they are justified.<sup>63</sup>

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<sup>60</sup> Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 571 (1998) (quoting THE FEDERALIST No. 78, at 441 (Alexander Hamilton) (Isaac Kramnick ed., 1987)).

<sup>61</sup> Griffin, *supra* note 14, at 774.

<sup>62</sup> *Id.* ("Of course, the courts cannot play the same role as the legislature in guaranteeing the system of rights. The courts cannot enact legislation or act on their own to create cases. Further, Rawls makes it clear that no branch of government has a monopoly on constitutional interpretation.").

<sup>63</sup> *Id.* at 775.

## II. THE WARREN COURT

Several hundred feet from the Tomb of the Unknowns at the Arlington National Cemetery, about a half-mile from John F. Kennedy's eternal flame, rests the grave of Earl Warren. The tombstone reads:

Where there is injustice, we should correct it; where there is poverty, we should eliminate it; where there is corruption, we should stamp it out; where there is violence we should punish it; where there is neglect, we should provide care; where there is war, we should restore peace; and wherever corrections are achieved we should add them permanently to our storehouse of treasures.<sup>64</sup>

This statement of Warren's personal philosophy, made in 1972 toward the end of his life, provides insight into how Warren approached his work as Chief Justice of the Supreme Court from 1953 to 1969. The Warren Court holds a special place in American history for its bold interpretations of the Constitution's mandates for fairness and equality for all. Indeed, the sheer scope of the Warren Court's influence approaches that of the foundational early-nineteenth-century Marshall Court.<sup>65</sup>

Over the course of 16 years, the Warren Court ended de jure racial segregation, broadened protections for criminal defendants, enhanced voting rights, bolstered freedom of the press and freedom of speech, halted the witch hunts for communists, and more.<sup>66</sup> Unphased by the firestorms of controversy its decisions created throughout the nation, the Court was resolute in its movement toward greater fairness and equal justice. In adopting broad readings of the Fourteenth Amendment's Equal Protection and Due Process Clauses, the Court embraced a new conception of individual rights based on core principles of human dignity.<sup>67</sup>

The Warren Court also substantially considered individual rights as protected by the First Amendment's grant of freedom of speech, including in the context of protests involving civil rights groups, the anti-Vietnam War movement, and church-state relations.<sup>68</sup> Regarding speech, the Justices bolstered protection of

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<sup>64</sup> JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 516-17 (2006); see also *Arlington National Cemetery Map*, ARLINGTON CEMETERY, [https://upload.wikimedia.org/wikipedia/commons/0/07/Arlington\\_National\\_Cemetery\\_map\\_-\\_2013.jpg](https://upload.wikimedia.org/wikipedia/commons/0/07/Arlington_National_Cemetery_map_-_2013.jpg) [<http://perma.cc/2HZB-CMD8>] (last visited Mar. 4, 2016) (showing the relationship of Warren's grave to the cemetery's other landmarks, including President Kennedy's flame and the Tomb of the Unknowns).

<sup>65</sup> Scheiber, *supra* note 2, at 1.

<sup>66</sup> NEWTON, *supra* note 64, at 11.

<sup>67</sup> Scheiber, *supra* note 2, at 20.

<sup>68</sup> *Id.*; see also *infra* notes 224-248 and accompanying text (discussing the Warren Court's First Amendment jurisprudence).

expressive conduct and symbolic speech. On the First Amendment's religion clauses, the Court embraced a more robust conception of the wall of separation between church and state than had ever been observed by earlier Courts.<sup>69</sup> The principles embraced by the Warren Court in these and other cases uncannily foreshadowed those later enunciated by John Rawls's formulation in 1971.

#### A. *Chief Justice Earl Warren*

Because the Warren Court's jurisprudence is so closely identified with its namesake, it is useful to discuss Earl Warren, the man. Warren joined the Court at age 62, appointed as Chief Justice by President Eisenhower upon the death of Chief Justice Fred Vinson in 1953. Warren was from California, where he had served for 10 years as governor, 4 years before that as California attorney general, and 14 years before that as Alameda County district attorney.<sup>70</sup>

When Warren joined the Court in 1953, America was still in many ways an immature work in progress. The decades-old paranoia of communism had reached full bloom with the advent of the Cold War and McCarthyism, when thousands of Americans had their careers and livelihoods destroyed by congressional committees bent on rooting out communist sympathizers based on the scantest of evidence. Reconstruction's early promise to integrate American society had devolved into nearly a century of institutionalized racism that continued to diminish the nation's moral authority. Earl Warren, who believed the nineteenth-century Supreme Court had failed in its duty to enforce the Fourteenth Amendment's mandate to protect African-Americans after the abolition of slavery, knew the twentieth-century Supreme Court should be doing more.<sup>71</sup>

The Court that Warren would be leading was highly polarized. Composed in the mid-1940s of "the most brilliant and able collection of Justices who ever graced the high bench together," according to Yale law professor Fred Rodell, each of

<sup>69</sup> Scheiber, *supra* note 2, at 20-21.

<sup>70</sup> CRAY, *supra* note 1, at 47, 97, 132, 254.

<sup>71</sup> Scheiber, *supra* note 2, at 16; *see, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding the doctrine of "separate but equal," thus opening the door for the perpetuation of another 60 years of apartheid throughout the South); *see also* NEWTON, *supra* note 64, at 3 ("[I]n 1953 [America] remained an immature country in many respects. Institutionally sanctioned racism eroded America's moral authority. The Cold War and internal debate over Communism ran rivulets of fear and divisiveness through the body politic. Spotty respect for the human rights promised to its citizens in the Declaration of Independence but withheld from them by its courts undermined America's desire to lead the world by example.").



whom "possessed . . . a peculiarly forceful personality[, and were as a group] . . . perhaps the most unbrotherly in the Court's annals."<sup>72</sup> The most prominent Justices of that Court were, on one side of the doctrinal divide, Hugo Black and William Douglas, and on the other, Felix Frankfurter and Robert Jackson. These Justices had deeply opposing views on the role of the Court in constitutional interpretation, and Warren's appointment to Chief Justice did little to appease this tension.<sup>73</sup> But as Chief Justice, it was Warren's responsibility to strike a balance and set the tone for the Court.<sup>74</sup> Warren excelled in this role.

Indeed, by many accounts, Earl Warren was an extraordinary leader, and his co-Justices stressed his exceptional ability to conduct conferences. "It is incredible how efficiently the Chief would conduct the Friday conferences," recounted Justice Brennan, "leading the discussion of every case on the agenda, with a knowledge of each case at his fingertips."<sup>75</sup>

Warren was an unapologetic activist in addressing certain matters that came before the Court. He was, for example, "convinced that his Court had no choice but to assert and enforce constitutional mandates for equal protection."<sup>76</sup> Yet Warren also believed that Congress had an equal responsibility to uphold the Constitution. He emphasized that a legislative approach achieved through the democratic process was in theory far superior to judicial interpretation alone (but only if the legislature exercised its power to achieve just outcomes).<sup>77</sup> For Warren, it was crucial that the legislative and judicial branches shared the task of interpreting and upholding the Constitution.

"The Warren Court, did not always have the luxury, however, of sharing the burden."<sup>78</sup> Congress was often unwilling, or simply unable, to adequately protect citizens' constitutional rights from the intrusions of an overweening bureaucracy. Professor and former Kennedy administration Solicitor General Archibald Cox explained, "the Warren Court's 'activism' was deployed mainly in these areas of law and policy, where, in [Warren's] opinion as in the Court's view, 'politicians [in Congress

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<sup>72</sup> BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 32 (1983).

<sup>73</sup> *Id.* "To Frankfurter," professor and biographer Bernard Schwartz explains, "the law was almost an object of religious worship—and the Supreme Court its holy of holies . . . . If Frankfurter saw himself as the priestly keeper of the shrine, he looked on [Hugo] Black and his supporters, notably [William] Douglas, as false prophets defiling hallowed ground." *Id.* at 40.

<sup>74</sup> *Id.* at 73.

<sup>75</sup> *Id.* at 144.

<sup>76</sup> Scheiber, *supra* note 2, at 15.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

or the states] were blind to fundamental injustice.”<sup>79</sup> Throughout the Warren Court years, social activists came to understand that their best ally in advancing their policy goals was the Court, not state legislatures or Congress.<sup>80</sup>

Warren believed that each case before the Court should be “evaluated in terms of practical application” and that the Court must consider “the human equation, for what we do with our legal system will determine what American life will be—not only now but in the years ahead . . . . [L]aw must not be placed in a straitjacket of historical precedent.”<sup>81</sup> As one of Warren’s law clerks, Curtis Reitz, explained, “He wasn’t tied down by doctrine. He wasn’t into the piddling kinds of distinctions that so box the lawyer . . . . His understanding of human beings, and his understanding of social conditions, and the way society and government worked, was absolutely extraordinary.”<sup>82</sup> Law, as Warren explained in a *Fortune* magazine article, “is simply a mature and sophisticated attempt, never perfected, to institutionalize this sense of justice and to free men from the terror and unpredictability of arbitrary force.”<sup>83</sup>

Warren admitted that he was not a legal scholar in the classic sense; he was, instead, a pragmatist. “I wish that I could speak to you in the words of a scholar . . . , but it has not fallen to my lot to be a scholar in life,” he stated in a 1957 speech, “I have been in public life for forty years. Since that time, I have been doing the urgent rather than the important.”<sup>84</sup> Warren’s lack of any judicial experience prior to coming to the Supreme Court allowed his common-sense interest in fairness and equal justice to flourish.<sup>85</sup>

But Warren did not disregard the established law. He knew there had to be solid authority for ruling a certain way. He also knew, however, that one could find a legitimate legal argument for virtually any position.<sup>86</sup> Warren looked first to the facts of a given case. He decided cases on moral grounds: what

<sup>79</sup> *Id.* (quoting ARCHIBALD COX, *THE WARREN COURT* 70 (1968)).

<sup>80</sup> Gordon Silverstein, *The Warren Court and Congress*, in EARL WARREN AND THE WARREN COURT, *supra* note 2, at 197.

<sup>81</sup> CRAY, *supra* note 1, at 317 (quoting Warren).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (quoting Warren, *Fortune* magazine).

<sup>84</sup> SCHWARTZ, *supra* note 72, at 287; see also CRAY, *supra* note 1, at 531 (commenting, “Earl Warren was neither a student of government nor a judicial craftsman. Neither was he a legal scholar. He lacked an articulated judicial philosophy beyond the penetrating and constant query, ‘Is it fair?’”).

<sup>85</sup> Melissa Cully Anderson & Bruce E. Cain, *Venturing Onto the Path of Equal Representation: The Warren Court and Redistricting*, in EARL WARREN AND THE WARREN COURT, *supra* note 2, at 29, 40.

<sup>86</sup> CRAY, *supra* note 1, at 357.

helped the person as well as what would promote a more fair society. What Warren cared most about ultimately was who won and who lost.<sup>87</sup> Indeed, once, in a 1957 conference, an exasperated Felix Frankfurter exclaimed to Warren, "God damn it, you're a judge! You don't decide cases by your sense of justice or your personal predilections." To which Warren replied with matching passion, "Thank heaven, I *haven't* lost my sense of justice."<sup>88</sup>

Over time, Frankfurter's clever procedural maneuverings alienated Warren, leading Warren to reject overly formalist readings of jurisdictional rules.<sup>89</sup> Warren complained that the rules were "only binding because Felix says so."<sup>90</sup> Warren learned from watching Felix Frankfurter that "a judge could do whatever he damn pleased . . . . At least it didn't turn much on whether he had a legal basis for it. And so [Warren] didn't give so much of a damn about the legal grounds."<sup>91</sup>

Justice Frankfurter, by contrast, advocated for judicial restraint, and he typically went to considerable lengths to find legislative or other official bases for the Court not to hear or decide a particular dispute. Above all, Frankfurter believed it was inappropriate for a judge to impose his own views on the Constitution, on the reasoning that such behavior is more legislative than judicial in nature.<sup>92</sup>

Frankfurter vehemently opposed Warren's activist, equity-based approach.<sup>93</sup> Frankfurter's frequent correspondence with the esteemed Judge Learned Hand of the U.S. Court of Appeals for the Second Circuit was withering in its criticisms of Warren and his activist allies on the Court. Frankfurter complained to his fellow Justices as well. "I do not conceive," he fumed in a 1957 note to Justice William Brennan, "that it is my function to decide cases on my notion of justice and, if it were, I wouldn't be as confident as some others that I know exactly what justice requires in a particular case . . . . I envy those for whom the dictates of justice are spontaneously revealed."<sup>94</sup> For

<sup>87</sup> *Id.* at 356.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 310.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* (quoting Gunther) (stating also, "[and so t]he Chief struck out on his own, . . . no longer intimidated by Frankfurter's erudition and his own inexperience").

<sup>92</sup> SCHWARTZ, *supra* note 72, at 265.

<sup>93</sup> CRAY, *supra* note 1, at 307.

<sup>94</sup> SCHWARTZ, *supra* note 72, at 267. According to Justice Potter Stewart, Frankfurter

was as fickle as a high school girl. I understand . . . that, when Earl Warren first came to the Court as Chief Justice [in 1953], Felix was going around Washington saying, 'This is the greatest Chief Justice since John Marshall

his part, a bitter Judge Hand wrote to Frankfurter, "It must be damnable . . . to be one of a bunch that can never agree, and of whom four at any rate regard themselves as Teachers of the Four Fold Way and the Eight Fold Path." Elsewhere, Hand denigrated "those Harbingers of a Better World—Black, Douglas, Brennan and THE CHIEF" and called the four 'the Jesus Quartet,' 'the Jesus Choir,' and 'the Holy Ones.' 'Oh,' he declared in still another letter, 'to have the inner certainties of those Great Four of your Colleagues!'"<sup>95</sup>

Warren believed that the Court had a responsibility to enforce constitutional guarantees, and anything less amounted to "judicial abnegation."<sup>96</sup> Too much judicial restraint, Warren believed, had led to the Court's failure to address the many problems facing Americans at that time. This judicial neglect had created conflict and division in the nation,<sup>97</sup> and Warren understood the Court's imperative to be to meet the needs of a dissenting society by facing those problems head on and according to the principles as interpreted by the judiciary.<sup>98</sup> To critics who accused the Court of "throwing society in a turmoil . . . [by] look[ing] about for sore spots in the society and proceed[ing] to operate upon them," Warren responded: "That is not how we work . . . . We reflect the burning issues of our society; we do not manufacture them . . . . [T]he times we are living in determine the kind of cases we hear."<sup>99</sup> And to friends who complained that the Court was going too fast, Warren emphasized, "There should be no delay in correcting a mistake."<sup>100</sup>

Indeed, Warren viewed the Supreme Court as something akin to a modern-day Court of Chancery, charged with securing equity and fairness in individual cases, especially those involving poor, less advantaged, or underprivileged parties.<sup>101</sup> During oral arguments, it was not unusual for

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and maybe greater.' And by the time I got here [in 1958, he] had very much been disenchanted by the Chief Justice.

*Id.* at 147.

<sup>95</sup> *Id.* at 277-78 (footnotes omitted). Justice Frankfurter's doctrinal approach often prevailed in Warren's first decade on the Court. After Frankfurter's 1962 retirement, however, "it seems Warren's natural leadership skills and fundamental commitment to equality 'won over' the rest of the Court." Anderson & Cain, *supra* note 85, at 43.

<sup>96</sup> SCHWARTZ, *supra* note 72, at 265.

<sup>97</sup> *Id.*

<sup>98</sup> CRAY, *supra* note 1, at 317.

<sup>99</sup> *Id.* at 462.

<sup>100</sup> *Id.* at 339.

<sup>101</sup> SCHWARTZ, *supra* note 72, at 252, 267.

Warren to sit silently, "only to lean forward at the end of an argument to ask, 'Yes, but is it *fair*?'"<sup>102</sup>

As an illustration of its equitable approach, the Warren Court frequently considered the merits when deciding employment cases that turned on issues of fact. Warren drew upon his personal experience working for the Southern Pacific Railroad in his youth (where his father had worked as well) in making a special point to protect workers who had suffered devastating accidents.<sup>103</sup> He took seriously the Supreme Court's role as the final chance for aggrieved widows and orphans to recover under the Federal Employers Liability Act (FELA), instructing his clerks to regularly take FELA cases in order to demonstrate the Court's commitment to enforcing the statute.<sup>104</sup>

The same sensibilities were revealed in *Voris v. Eikel*, a case involving a workers' compensation claim.<sup>105</sup> In *Voris*, the lower court had denied an injured longshoreman's claim because he had failed to notify his employer as required by the workers' compensation statute. In a short opinion authored by Warren, the Court reversed on the ground that the worker's notification of his immediate supervisor was adequate to satisfy the statutory notification requirements. In the opinion, Warren stated that the "Act must be liberally construed . . . and in a way which avoids harsh and incongruous results."<sup>106</sup> Warren's reasoning, essentially Rawlsian in its concern for *fairness*—is typical of Warren's equitable approach across the board.

Additional anecdotes epitomize Warren's passion for justice and fairness. Warren's longtime colleague Justice William

<sup>102</sup> CRAY, *supra* note 1, at 317 (emphasis added).

<sup>103</sup> SCHWARTZ, *supra* note 72, at 270-71.

<sup>104</sup> *Id.* at 271. "Once installed in the Chief's office, [his law clerks] discovered their training and honed intelligence were less important to Warren than their humanity," Cray reported. "That overriding sense of justice led the Chief to instruct his clerks when they were reviewing petitions for certiorari not to keep off petitioners 'where personal rights are concerned. With property cases, we may be more severe and deny cert[iorari].'" CRAY, *supra* note 1, at 356.

<sup>105</sup> *Voris v. Eikel*, 346 U.S. 328 (1953).

<sup>106</sup> SCHWARTZ, *supra* note 72, at 134. The Warren Court's approach in these cases is in sharp contrast to that of the modern Supreme Court, where the Court more willingly denies recourse. See, e.g., *Ledbetter v. Goodyear Tire & Rubber*, 550 U.S. 618 (2007) (barring recovery under claim of gender-based pay discrimination because of plaintiff's failure to timely contest, within the statutorily required 180 days, each year's disparate salary, even though she only became aware of disparities after many years of unequal salaries). Combined with the related issue of the Court's overly expansive interpretation of states' sovereign immunity under the Eleventh Amendment (see, for example, *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (finding unconstitutional Congress's provision in the Age Discrimination in Employment Act of 1967 allowing individual plaintiffs to sue states for age discrimination in employment settings)), these cases show a Roberts Court that is demonstrably less friendly to more vulnerable and less powerful members of society.

Douglas opined, at the time of Warren's death in 1974, that "in many ways the lesser cases mirrored the philosophy of the man."<sup>107</sup> Schwartz suggested that Warren's character was perhaps best exemplified in the 1967 *Brooks v. Florida*<sup>108</sup> case. *Brooks* involved the aftermath of a riot by African-American inmates in a Florida prison, where Brooks and the others were placed naked, in the Supreme Court's words, in a "windowless sweatbox . . . a barren cage fitted only with a hole in one corner into which he and his cell mates could defecate."<sup>109</sup> Brooks was kept in the cell with only the sparsest of rations; when he was removed from the cell after two weeks, he signed a confession within minutes—evidence that was accepted by the Florida Supreme Court in affirming his conviction for participating in the riot. Warren was angered by the Supreme Court's 8-1 vote to deny certiorari, reportedly exclaiming, "Doggone it! If those guys don't want to take this case, I want to be sure that every gruesome detail is recorded in those books up there [pointing to the Supreme Court Reports] for posterity." After sharing a very pointed dissent, Warren "just kind of sat in his office and waited." In the next month, the Justices came in one by one and joined the dissent. By the next conference on the case, the Chief had the votes of all, not only for the granting of cert, but for summary reversal."<sup>110</sup>

So while Justice Frankfurter may have viewed the Court as solely a "seat of law," Justice Warren viewed it "as a seat of justice."<sup>111</sup>

### B. *Equity as a Guiding Principle for the Warren Court*

Underlying virtually every aspect of the Warren Court's (and Earl Warren's) jurisprudence was a concern for *fairness*.<sup>112</sup> In judicial conference for one of the reapportionment cases,<sup>113</sup> for example, Justice Douglas recalls Warren stating that the "starting point in this type of case is whether apportionment meets standards of republican form of government . . . that

<sup>107</sup> SCHWARTZ, *supra* note 72, at 155-56 (citing Douglas in *ABA Journal*).

<sup>108</sup> *Brooks v. Florida*, 389 U.S. 413 (1967).

<sup>109</sup> *Id.* at 414.

<sup>110</sup> SCHWARTZ, *supra* note 72, at 719-20 (quoting Tyrone Brown, the law clerk who worked on the case); see also CRAY, *supra* note 1, at 446-47 (similarly describing Warren's behind-the-scenes efforts in the *Brooks* case).

<sup>111</sup> CRAY, *supra* note 1, at 310.

<sup>112</sup> See *supra* notes 97-98 and accompanying text. "Warren distinguished himself from his colleagues on the Court by his reliance on intuition, instinct," and what Warren's 1963 law clerk Frank Beytagh referred to as "overwhelming dedication to fairness." Anderson & Cain, *supra* note 85, at 44.

<sup>113</sup> See *infra* Section II.C.2.

means, is it representative? Is it *fairly* representative?"<sup>114</sup> Warren insisted that equality should be the starting point for the judiciary in language that John Rawls might have also used 10 years later in constructing *A Theory of Justice*: "Equal representation is basic."<sup>115</sup>

The Warren Court's fairness jurisprudence was animated by the ancient doctrine of equity. Equity as a concept seems to have been first enunciated around 340 B.C. by Aristotle, who commented, "For that which is equitable seems to be just, and equity is justice that goes beyond the written law."<sup>116</sup> Some two millennia later, in 1835, U.S. Supreme Court Justice Joseph Story explained:

In the most general sense, we are accustomed to call that Equity which in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex aequo et bono* . . . Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance. It is impossible, that any code, however minute and particular, should embrace, or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them.<sup>117</sup>

Equity, in short, is a necessary gap filler in any legitimate system of laws.

Equity has a long tradition in American law, with its antecedent in English law. In England, the concept began to take shape as early as the Norman period (the eleventh and twelfth centuries) with the formation of the *Curia Regis*, or King's Court. "It is to be understood that the King's Court was a sure asylum for the oppressed,"<sup>118</sup> authoritative histories instruct. Over the following centuries, the Court of Chancery's caseload increased, and it became dramatically influential. In the process, it sparked long-standing turf wars between itself and Courts of Law—until

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<sup>114</sup> Anderson & Cain, *supra* note 85, at 44.

<sup>115</sup> *Id.* at 44, 45; see also Vicki C. Jackson, *The Early Hours of the Post-World War II Model of Constitutional Federalism: The Warren Court and the World*, in EARL WARREN AND THE WARREN COURT, *supra* note 2, at 137, 157 (commenting that the *Reynolds v. Sims* reapportionment decision's "one-person, one vote principle was accessible to the popular sense of fairness"). See *infra* notes 149-171 and accompanying text for discussion of reapportionment cases.

<sup>116</sup> GARY L. McDOWELL, *EQUITY AND THE CONSTITUTION* 5 (1982) (quoting ARISTOTLE, *MAGNA MORALIA* (Loeb Classical Library ed., G. Cyril Armstrong trans., Harvard University Press 1935)); see also HENRY L. MCCLINTOCK, *MCCLINTOCK ON EQUITY* 1-23 (1936) (referencing equity's historical roots).

<sup>117</sup> JOSEPH STORY, 1 *COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND THE UNITED STATES* § 56-58, at 62-65 (Arno 1972).

<sup>118</sup> A.H. MARSH, *HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY* 12 (1890) (quoting 1 MADOX' *HISTORY OF THE EXCHEQUER* 120 (1711)).

its dissolution and merger with those Courts of Law in 1875.<sup>119</sup> “In the course of time the Chancellor . . . came to be called the keeper of the King’s conscience.”<sup>120</sup> The Chancery was considered to be “the secret closett of his Majesty’s conscience where his oppressed and distressed subjects hope to find mercy and mitigation against the rigour and extremitye of his lawes.”<sup>121</sup> Or, as Lord Chancellor Ellesmere explained, Chancery “is the refuge of the poor and afflicted, it is the altar and sanctuary for such as against the might of rich men and the countenance of great men, [who] cannot maintain the goodness of their cause and the truth of their title.”<sup>122</sup>

In the United States (and the colonies before them), after a slow start, equity began to have a place in the Enlightenment theory that culminated around the end of the eighteenth century, explained Justice Joseph Story in his highly influential 1835 work, *Commentaries on Equity Jurisprudence* (cited by, among many others, Abraham Lincoln).<sup>123</sup> As for its nature, equity originates from the same sources as in England, and it is applied in much the same manner. As Story notes: “The Constitution of the United States has . . . conferred on the National Judiciary cognizance of cases in Equity, as well as in Law; and the uniform interpretation of the clause has been, that . . . Equity Jurisprudence embraces the same matters of jurisdiction and modes of remedy, as exist in England.”<sup>124</sup>

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<sup>119</sup> *Id.* at 47-48. Among the objections to Chancery were those of subjectivity, as expressed famously by the seventeenth-century jurist John Selden:

Equity is a roguish thing; for law we have a measure and know what to trust to. Equity is according to the conscience of him that is Chancellor; and as that is larger or narrower, so is equity. ‘Tis all one as if they should make the standard for the measure the Chancellor’s foot. What an uncertain measure would this be? One Chancellor has a long foot, another a short foot; a third an indifferent foot. It is the same thing with the Chancellor’s conscience.

*Id.* at 103-04.

<sup>120</sup> *Id.* at 14; see also DENNIS R. KLINCK, CONSCIENCE, EQUITY AND THE COURT OF CHANCERY IN EARLY MODERN ENGLAND 1-2 (2010).

<sup>121</sup> MARSH, *supra* note 118, at 14-15 (quoting Hargrave’s Law Tracts, 427).

<sup>122</sup> *Id.* at 48. See generally CANDACE S. KOVACIC-FLEISCHER ET AL., EQUITABLE REMEDIES, RESTITUTION AND DAMAGES 2-8 (8th ed. 2011).

<sup>123</sup> STORY, *supra* note 117, at 62-63. In a September 25, 1860, letter to an aspiring lawyer, Abraham Lincoln wrote:

Dear Sir: . . . The mode [of learning the law] is very simple, though laborious, and tedious. It is only to get the books, and read, and study them carefully. Begin with Blackstone’s Commentaries, and after reading it carefully through, say twice, take up Chitty’s Pleadings, Greenleaf’s Evidence, & Story’s Equity &c. in succession. Work, work, work, is the main thing. Yours very truly A. Lincoln.

<http://www.abrahamlincolnonline.org/lincoln/speeches/law.htm> [http://perma.cc/EJ8S-XXRN] (last visited Mar. 4, 2016).

<sup>124</sup> KOVACIC-FLEISCHER ET AL., *supra* note 122, at 64-65.



Specifically, Courts of Equity are not as constrained as Courts of Law. While they have certain prescribed procedures, Courts of Equity may adjust their approaches to fit the needs of different cases. They may model the remedy and adjust the rights of all interested parties, whereas common law courts must confine their reach to the parties in the instant case.<sup>125</sup> Moreover, a Court of Equity's jurisdiction may extend to those instances "where the principles of law, by which the ordinary courts are guided, give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent."<sup>126</sup>

More recently, *McClintock on Equity* explains, "Equity jurisdiction may attach [in the United States] in almost any field of the law, where the circumstances may call for the exercise of its peculiar powers."<sup>127</sup> A recently published casebook on equitable remedies adds that equitable doctrines "have continuing vitality insofar as they inspire judges to consider themselves as being bound by a higher obligation."<sup>128</sup> Moreover, it states, "Modern judges . . . exercising 'equitable jurisdiction,' like the early chancellors, feel less constricted in their application of precedents than do their counterparts who are exercising jurisdiction over claims for legal relief."<sup>129</sup>

The principle that courts in the United States have wide latitude to offer equitable relief has long been recognized by the Supreme Court. In an 1869 contract case, for example, the Court announced that "relief . . . is a matter resting in the discretion of the court [of equity], to be exercised upon a consideration of all the circumstances of each particular case."<sup>130</sup> Nearly 100 years later, the Warren Court embraced equitable principles in the landmark case of *Brown v. Board of Education* when it announced that "[i]n fashioning and effectuating the decrees, the courts will be guided by equitable principles . . . . These cases call for the exercise of these traditional attributes of equity power," and "[c]ourts of equity may properly take into account the public interest in the

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<sup>125</sup> *Id.* § 28, at 27-28.

<sup>126</sup> *Id.* § 32, at 30-31 (quoting Lord Redesdale); see also MCCLINTOCK, *supra* note 116, at 29, 52-53 (citing 1 POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AND EQUITABLE REMEDIES § 363 (4th ed. 1918)) (describing certain "maxims of equity . . . that guide courts of equity in the exercise of their discretion").

<sup>127</sup> MCCLINTOCK, *supra* note 116, at 60. See generally KOVACIC-FLEISCHER ET AL., *supra* note 122, at 8-11. General courts of law could hear both law and equity cases beginning around the 1850s. In 1938, the Federal Rules of Civil Procedure merged law and equity. Many courts of law thereafter embraced the more flexible equity court procedures. *Id.*

<sup>128</sup> KOVACIC-FLEISCHER ET AL., *supra* note 122, at 11.

<sup>129</sup> *Id.* at 12.

<sup>130</sup> Willard v. Tayloe, 75 U.S. (8 Cranch) 557, 565 (1869).

elimination of such obstacles in a systematic and effective manner.”<sup>131</sup>

In sum, the fairness jurisprudence of the sort practiced by the Warren Court and as promoted by John Rawls’s original position theory has a long history in the Anglo-American legal tradition. The next section examines the specific constitutional bases for the Court’s equity-based approach.

### C. *Constitutional Bases: Equal Protection*

The Warren Court accomplished much of its work by breathing life into the Fourteenth Amendment’s Equal Protection and Due Process Clauses—provisions the Court read as essentially providing for fair, equitable outcomes. Earl Warren’s position regarding equal protection and due process “rested on his profound belief that America’s highest court must interpret the Constitution in light of ‘the evolving standards of decency that mark the progress of a maturing society.’”<sup>132</sup> Warren believed that the Constitution’s provisions for the Court’s role were not “hollow shibboleths’ but rather must be continuously evaluated and advanced as ‘living principles.’”<sup>133</sup>

Regarding the Equal Protection Clause, the Warren Court’s jurisprudence revolutionized what it meant to enjoy “equal protection of the laws” in America. During the nearly hundred years following the Fourteenth Amendment’s ratification in 1868, the Court refused to consider that the clause—once derided by Justice Oliver Wendell Holmes as “the usual last resort of constitutional arguments”<sup>134</sup>—might embrace anything beyond official racial discrimination. And even then, the Court interpreted the clause very narrowly, holding in *Plessy v. Ferguson* in 1896 that laws requiring separation of the races did not technically violate the letter of the Equal Protection Clause, so long as alternate facilities were “equal.”<sup>135</sup> Beginning with its first landmark decision, *Brown v. Board of Education*, however, the Warren Court transformed the clause into what is now a robust provision protecting not only against racial discrimination

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<sup>131</sup> *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 300 (1955) [hereinafter *Brown II*] (emphasis added); see also *infra* notes 139-148 and accompanying text (discussing *Brown v. Board of Education*).

<sup>132</sup> Scheiber, *supra* note 2, at 20.

<sup>133</sup> *Id.*

<sup>134</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 539 (1942) (citing Justice Oliver Wendell Holmes’s opinion for the Court in *Buck v. Bell*, 274 U.S. 200, 208 (1927)).

<sup>135</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

but also against a broad range of other forms of injustice, including discriminatory practices involving voting rights.<sup>136</sup>

### 1. School Desegregation Cases

The first major case of Earl Warren's tenure as Chief Justice, *Brown v. Board of Education*,<sup>137</sup> dramatically and fundamentally altered how the Supreme Court would treat racially discriminatory practices, effectively putting to an end the system of institutionalized apartheid that had existed in the United States since the Court's "separate but equal" *Plessy* decision.<sup>138</sup> The Court in *Brown* concluded that *Plessy*'s separate-but-equal doctrine allowing racial segregation in schools denied equal educational opportunities to minority children and accordingly found such practices unconstitutional under the Equal Protection Clause. Writing for a unanimous Court, Chief Justice Warren reasoned,

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>139</sup>

Appealing to notions of basic fairness (in terms resembling those later expressed in John Rawls's "original position of equality" theory), the Court concluded that "these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>140</sup>

Of course, putting an end to deeply ingrained, centuries-old segregation practices would not simply be a matter of

<sup>136</sup> See *infra* Section II.C.2.

<sup>137</sup> *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955); see also, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down state laws prohibiting interracial marriage).

<sup>138</sup> Sheila Foster, *Race, Agency, and Equal Protection: A Retrospective on the Warren Court*, in EARL WARREN AND THE WARREN COURT, *supra* note 2, at 77-78; see also Scheiber, *supra* note 2, at 3 (stating, "[*Brown*] served to redefine dramatically the constitutional imperatives of equal protection"). After *Brown*, the Court has expanded the Equal Protection Clause's reach beyond race to also include gender (*Craig v. Boren*, 429 U.S. 190, 197-98 (1976)); national origin (*Korematsu v. United States*, 323 U.S. 214, 216 (1944)); alienage (*Graham v. Richardson*, 403 U.S. 365, 371-72 (1971)); and children of unmarried parents (*Clark v. Jeter*, 486 U.S. 456, 461-62 (1988)); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 713 (4th ed. 2011) (summarizing the Court's equal protection doctrine).

<sup>139</sup> *Brown*, 347 U.S. at 492-93.

<sup>140</sup> *Id.*

declaring such practices unconstitutional. A Court-ordered remedy would also be necessary; accordingly, the Supreme Court carried over to the next year, 1955, the question of what would be the proper approach for effectuating the desegregation of schools. In the follow-up case, *Brown v. Board of Education (Brown II)*,<sup>141</sup> the Court remanded the cases to the federal district courts that had originally heard the cases, explaining that “[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems[, but] courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”<sup>142</sup> The Court looked squarely and expressly to the judiciary’s power of *equity*:

In fashioning and effectuating the decrees, the courts will be guided by *equitable* principles. Traditionally, *equity* has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of *equity* power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles . . . Courts of *equity* may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner.<sup>143</sup>

Among the remarkable aspects of *Brown* was that it was a unanimous decision. According to Justice William Douglas’s memoirs, when the case had first been argued before the Supreme Court only the previous year (then led by Chief Justice Fred Vinson), it seemed likely that the Court would vote 5-4 to *uphold* the separate-but-equal doctrine. Reaction to the Court’s decision—especially the unanimity—was one of shocked surprise.<sup>144</sup> For his part, Warren credited the three Southern Justices. “Don’t thank me,” he advised a friend, “I’m not the one. You should see what those . . . fellows from the southern states had to take from their constituencies. It was absolutely slaughter. They stood right up and did it anyway because they thought it was right.”<sup>145</sup>

*Brown* was met with massive resistance. State officials opposed desegregation in myriad ways. They claimed, for example, that the Court’s mandate was simply not binding—that

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<sup>141</sup> *Brown II*, 349 U.S. 294.

<sup>142</sup> *Id.* at 299.

<sup>143</sup> *Id.* at 300 (emphasis added) (footnotes omitted).

<sup>144</sup> CRAY, *supra* note 1, at 287 (stating that, upon announcing the decision, “Warren sensed more than heard a collective gasp from the people in the courtroom, ‘a wave of emotion’ without sound or movement, ‘yet a distinct emotional manifestation that defies description’”).

<sup>145</sup> SCHWARTZ, *supra* note 72, at 106.

their legislatures could pass measures of “nullification” and “interposition,” invalidating Court decisions they believed were unconstitutional. The Court resoundingly rejected these arguments in *Cooper v. Aaron*,<sup>146</sup> just as it had done in a series of cases in the pre-Civil War era a century earlier.<sup>147</sup> Nonetheless, true progress in desegregation did not occur for a full decade or more after *Brown*—but in the end, the equal opportunity mandate prevailed.<sup>148</sup>

## 2. Reapportionment Cases

All too often throughout the nation’s history, legislatures have enacted voting regulations and restrictions that have disproportionately affected and effectively disenfranchised poor and vulnerable citizens, often from racial minority groups.<sup>149</sup> These barriers on voting have only compounded the separate, longstanding problem of rampant malapportionment and racial gerrymandering, which have resulted in the underrepresentation of racial minorities in both state legislatures and Congress.<sup>150</sup>

In the early 1960s, as it tackled malapportionment, the Warren Court looked to the newly robust post-*Brown* Equal Protection Clause. Until the Warren Court issued its landmark *Baker v. Carr*<sup>151</sup> and *Reynolds v. Sims*<sup>152</sup> decisions in 1962 and 1964, for many decades, the Supreme Court stood mutely by on malapportionment issues. *Baker* and *Reynolds* established the

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<sup>146</sup> *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (unanimously repudiating the State of Arkansas’s arguments in refusing to integrate Little Rock schools).

<sup>147</sup> See, e.g., *Ableman v. Booth*, 62 U.S. (21 How.) 506, 514, 525-26 (1859) (rejecting the Wisconsin Supreme Court’s attempt to repudiate the federal Fugitive Slave Act).

<sup>148</sup> By 1964, only 1.2% of black children in the South were attending school with whites. By contrast, by 1968 (as aided greatly by the Civil Rights Act of 1964, which both authorized the U.S. Attorney General to intervene against laggard school districts and tied receipt of federal education funds to compliance with the desegregation mandate), 32% of districts were desegregated (by 1973, 91% were desegregated). CHEMERINSKY, *supra* note 138, at 741-42.

<sup>149</sup> See, e.g., Jackson, *supra* note 115, at 154-55 (“Malapportionment, as it existed in many states, was severe, reinforcing racial inequalities as blacks moved to cities, and . . . [was] completely lacking in a foreseeable political remedy. Such a system was not only inconsistent with fundamental commitments to equality in voting, or to the idea that there were some bases on which it was impermissible to deny a vote, but with the character of the U.S. Constitution as a representative democracy.”).

<sup>150</sup> Indeed, both of these problems have recently reemerged in the current Roberts Court’s decisions in such cases as *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) (upholding a state law requiring all voters to show a photo identification) and *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (effectively striking down section 5 of the Voting Rights Act of 1965 requiring certain jurisdictions to receive preclearance from the Justice Department before changing voting laws or district boundaries).

<sup>151</sup> *Baker v. Carr*, 369 U.S. 186 (1962) (finding redistricting cases justiciable).

<sup>152</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964) (striking down malapportionment).

now-axiomatic "one person, one vote" principle<sup>153</sup>—that one person's vote in any election should be counted with the same weight as any other person's vote—as a core element of fair elections in a democracy.

*Baker* involved a claim by Tennessee voters that a state apportionment statute used an irrational, unreasonable formula for assigning representatives to the state legislature, thus violating plaintiffs' Fourteenth Amendment equal protection and due process rights. Not surprisingly, in the district court, the case was found nonjusticiable and dismissed, since matters involving apportionment had long been held by the Court to be nonjusticiable political questions under the Constitution's Guaranty Clause, which expressly left such matters solely to Congress,<sup>154</sup> even when state apportionment schemes are blatantly discriminatory. In the 1946 case *Colegrove v. Green*, for example, Justice Felix Frankfurter explained (in denying review of an Illinois malapportionment where counties with populations of 1,000 and 100,000 would each be entitled to one representative), "If Congress failed . . . , whereby standards of fairness are offended, the remedy ultimately lies with the people."<sup>155</sup>

Justice Brennan's opinion for the Court some 16 years later in *Baker*, by contrast, concluded that in determining whether a state apportionment system violates the Fourteenth Amendment's Equal Protection Clause (as opposed to the Article IV Guaranty Clause), none of the traditionally recognized political question factors—including "textually demonstrable constitutional commitment [to another political branch],"<sup>156</sup> which had been the justification in the Guaranty Clause cases—apply. "Judicial standards under the Equal Protection Clause are well developed and familiar," the Court explained, "and it has been open to courts

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<sup>153</sup> *Reynolds*, 377 U.S. at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

<sup>154</sup> See, e.g., U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . ."); U.S. CONST. art. IV, § 4 (Guaranty Clause) ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."). See *Baker*, 369 U.S. at 217, for the Court's full elucidation of political question factors. The first factor, at issue here, designates as nonjusticiable political questions those matters where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.*

<sup>155</sup> *Colegrove v. Green*, 328 U.S. 549, 554 (1946); see also *South v. Peters*, 339 U.S. 276, 277 (1950) (similarly finding nonjusticiable a matter involving state electoral apportionment).

<sup>156</sup> *Baker*, 369 U.S. at 217.

since the enactment of the Fourteenth Amendment to determine" whether a particular law violates the clause.<sup>157</sup>

The *Baker* majority's sea change away from a long history of judicial passivity on the apportionment issue was met with powerful resistance by Justice Frankfurter.<sup>158</sup> Frankfurter castigated the majority's new position in a note to Justice John Harlan after the conference discussion: "What powerfully emerged for me this afternoon . . . is that men who so readily impose their will on the nation and the fifty states by exultingly overruling their most distinguished predecessors behave like subservient children when lectured by a martinet with a papa-knows-best-for-the-best complacency."<sup>159</sup> Regarding the decision itself, Frankfurter warned that it would leave the courts in a "mathematical quagmire," with little legal basis on which to proceed.<sup>160</sup>

Two years later, in *Reynolds v. Sims*, with the justiciability barrier having been removed by *Baker*, the Court then considered and struck down an Alabama apportionment system in which Alabama failed, over the course of many decades of shifting populations, to redistrict as required by the state constitution. This resulted in a gross malapportionment that disadvantaged black voters. Chief Justice Warren explained:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.<sup>161</sup>

The Chief Justice further explained:

Legislators represent people, not trees or acres . . . . It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state

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<sup>157</sup> *Id.* at 226.

<sup>158</sup> Anderson & Cain, *supra* note 85, at 35.

<sup>159</sup> SCHWARTZ, *supra* note 72, at 424.

<sup>160</sup> *Id.* at 424-25.

<sup>161</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *see also* *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (stating, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote"); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding unconstitutional a Georgia districting system).

legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical.<sup>162</sup>

In short, the Court concluded that the Equal Protection Clause guarantees all voters equal participation in elections.<sup>163</sup>

The *Reynolds* opinion, which Justice William Brennan later suggested was driven by Warren's core sense of fairness,<sup>164</sup> hit with breathtaking force.<sup>165</sup> For traditionalists, "[t]he outcry was immediate and pained." The Court "finished its work of completely devastating one of the most basic and one of the most revered concepts of American constitutional government, [federalism],"<sup>166</sup> claimed Missouri Democrat Richard Ichord. *New York Times* columnist Arthur Krock lamented the decision as misguided, an

expression of the philosophy that the Constitution implicitly provides for the correction of any social or political condition that a majority of the Court deems undesirable and endows the Court with power to take the functions of another branch of Government when that branch fails to act.<sup>167</sup>

Many others, however, believed the Court to be well justified, urging critics to remember that the Court stepped in to answer the apportionment question only after the states had utterly failed to fairly consider the issue. It was left to the Court, therefore, with its unique standing within the federalist regime, to correct a deep injustice to core voting rights.<sup>168</sup>

Warren himself never doubted the propriety of the "one person, one vote" mandate. "If *Baker* had been in existence 50

<sup>162</sup> *Reynolds*, 377 U.S. at 562-63.

<sup>163</sup> *Id.* at 567. *Reynolds* specified, moreover, that the one person, one vote principle applies to both the lower and upper chambers in a bicameral state legislature. *Id.* at 575-76.

<sup>164</sup> CRAY, *supra* note 1, at 435 (quoting Justice Brennan, "Possessed of an equal right to vote, the least of us, [Warren] thought, would be armed with an effective weapon needed to achieve a fair share of the benefits of our free society").

<sup>165</sup> Anderson & Cain, *supra* note 85, at 47 ("[O]ne journalist at the time likened being in the Court on the day *Reynolds* was announced to 'being present at the second American Constitutional Convention.' Even liberals and academics, warm to the Warren Court, he continued, were 'stunned.'" (footnote omitted) (quoting LUCAS A. POWE JR., *THE WARREN COURT AND AMERICAN POLITICS* 252 (2000))).

<sup>166</sup> CRAY, *supra* note 1, at 435 (quoting Rep. Richard Ichord).

<sup>167</sup> SCHWARTZ, *supra* note 72, at 507 (quoting Arthur Krock); *see also* CRAY, *supra* note 1, at 435 (quoting Senator Barry Goldwater, who made the Supreme Court a political issue in his presidential campaign, "I would be very, very worried about who is president the next four or eight years, thinking of only one thing—the makeup of the Supreme Court" (quoting Sen. Barry Goldwater)).

<sup>168</sup> Jackson, *supra* note 115, at 141 & n.11 (citing ALPHEUS THOMAS MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 239-40 (1968) (stating the "Court's reapportionment cases [were] prompted by 'necessity'")); *see also* MARTIN M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 247 (1964) (stating, "[I]t should be remembered . . . that the Court did not act in the apportionment area until long after the states had shown themselves totally incapable of doing the job").



years ago, we would have saved ourselves acute racial troubles. Many of our problems would have been solved a long time ago," he asserted, in terms John Rawls might have later used in his own justice-as-fairness theory, "if everyone had the right to vote, and his vote counted the same as everybody else's. Most of these problems could have been solved through the political process rather than through the courts. But as it was, the Court had to decide."<sup>169</sup> Indeed, Warren later said that he considered the reapportionment cases to be "his Court's single most profound contribution to the law . . . because only with equality in voting could the political system live up to the nation's ideal of democratic elections and lawmaking."<sup>170</sup>

In sum, *Baker* and *Reynolds* were enormously influential. As Justice William Douglas recalled in his autobiography, 36 states had reformed their apportionment schemes by 1970. When combined with the Voting Rights Act of 1965, the Court's attention to reapportionment resulted in changes to 90% of U.S. congressional districts and to virtually all state legislative districts.<sup>171</sup>

#### D. *Constitutional Bases: Due Process*

The Warren Court also embraced a more expansive reading of the Fourteenth Amendment's Due Process Clause, which states, "nor shall any State deprive any person of life, liberty, or property, without due process of law."<sup>172</sup> Under the Warren Court's jurisprudence, the Due Process Clause would now proscribe, via the incorporation doctrine, a much broader range of state conduct vis-à-vis Bill of Rights protections, and would begin offering heightened recognition to other enumerated and unenumerated individual rights, as well.

##### 1. Incorporation and the Bill of Rights

Another way the Warren Court greatly bolstered fairness for all Americans was in recognizing that most of the separate provisions in the Bill of Rights apply not only to the federal government, but also to state (and local) governments. In so

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<sup>169</sup> SCHWARTZ, *supra* note 72, at 508.

<sup>170</sup> Scheiber, *supra* note 2, at 3.

<sup>171</sup> Anderson & Cain, *supra* note 85, at 47; *see also* CRAY, *supra* note 1, at 437 ("Reynolds, coupled with the Voting Rights Act of 1965, had redrawn the political landscape. In Congress and state legislatures alike, long-tenured incumbents found their safe rural districts redrawn to accommodate urban and suburban growth. Many chose to announce their retirement." (footnote omitted)).

<sup>172</sup> U.S. CONST. amend. XIV, § 1.

doing, the Court showed sensitivity to, among other things, the exceedingly vulnerable position of criminal defendants in the face of a powerful prosecuting government.

Many are surprised to learn that the Bill of Rights—roughly 28 protections contained in the first 10 amendments that protect many of Americans' most dearly held liberties and rights against governmental infringement<sup>173</sup>—did not always apply to the state governments. Specifically, by their terms, the protections encompassed within the Bill of Rights apply only against the federal government.<sup>174</sup>

The Fourteenth Amendment's Privileges or Immunities Clause (stating, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States")<sup>175</sup> was intended to correct this shortcoming by applying those protections against state and local governments.<sup>176</sup> The Supreme Court, however, effectively read the Privileges or Immunities Clause out of the Constitution in 1873 in the *Slaughter-House Cases*,<sup>177</sup> just five years after the Fourteenth

<sup>173</sup> *Id.* amends. I-VIII. The 28 protections in the Bill of Rights are found within the following amendments: U.S. CONST. amend. I (rights of freedom of expression and freedom of press, of free exercise of religion, of assembly, of petition; right against government establishment of religion); U.S. CONST. amend. II (right to keep and bear arms); U.S. CONST. amend. III (rights against quartering soldiers in times of peace, and in times of war); U.S. CONST. amend. IV (rights against unreasonable search and seizure, against warrants without probable cause); U.S. CONST. amend. V (rights of criminal grand jury, of due process; rights against being twice charged for same crime, against self-incrimination, against takings of property); U.S. CONST. amend. VI (rights of speedy trial, of public trial, of impartial jury in district where crime occurred, of being informed of crime, of confronting witness against, of calling witnesses in favor, of assistance of counsel); U.S. CONST. amend. VII (rights of civil jury, of reexamination of facts only under common law rule); U.S. CONST. amend. VIII (rights against excessive bail, against excessive fines, against cruel and unusual punishment).

<sup>174</sup> See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833). The amendments constituting the Bill of Rights were proposed in 1789 and ratified in 1791, two years after the Constitution's ratification. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 3, 8 (1998).

<sup>175</sup> U.S. CONST. amend. XIV.

<sup>176</sup> See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (quoting Senator Jacob Howard, chair of the Joint Committee on Reconstruction, on May 24, 1866, "[Section 1 is intended to impose a] general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. . . . To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal right guaranteed and secured by the first eight amendments of the Constitution; such as the freedom of speech . . . [and] the right to keep and to bear arms"). Similarly, Representative John Bingham, Section 1's sponsor in the House, repeatedly explained that the Privileges or Immunities Clause would encompass "the bill of rights"—a phrase he used more than a dozen times in a key speech on February 28." AMAR, *supra* note 174, at 182. In response to John Bingham's strong statements in the House, nobody spoke up to disagree with him. *Id.* at 187 (stating further, "[s]urely, if the words of section I meant something different, this was the time to stand up and say so").

<sup>177</sup> *Butchers' Benevolent Ass'n of New Orleans v. Crescent City Livestock Landing & Slaughter-House Co.* (*Slaughter-House Cases*), 83 U.S. 36 (1872).

Amendment's ratification.<sup>178</sup> For many decades, therefore, states were allowed to continue abridging certain individual rights that would be protected but for the fact that it was a state, and not the federal government, abridging the rights.

Gradually, the Supreme Court began considering whether states might be depriving persons of "life, liberty, or property" in violation of the Fourteenth Amendment's Due Process Clause.<sup>179</sup> The first time the Court expressly applied a Bill of Rights provision to the states through the Due Process Clause was in the 1925 case, *Gitlow v. New York*.<sup>180</sup> There, the Court found that the First Amendment rights of freedom of speech and of the press were "fundamental personal rights and 'liberties'" that could not be impaired by the actions of the states.<sup>181</sup>

The Supreme Court incorporated several more constitutional provisions in the following decades.<sup>182</sup> The Warren Court began applying more provisions from the Bill of Rights to the states through its "selective incorporation" doctrine, which itself took a relatively more objective, searching look at the history of Reconstruction and the Fourteenth Amendment than that taken under the Court's earlier approach. Selective incorporation posed as the proper question for analysis whether a

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<sup>178</sup> For descriptions of how the Supreme Court arguably improperly found that the Privileges or Immunities Clause does not apply the Bill of Rights to the states, see, for example, Michael Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1, 27-35 (2007); Michael Anthony Lawrence, *The Potentially Expansive Reach of McDonald v. Chicago: Enabling the Privileges or Immunities Clause*, 2010 CARDOZO L. REV. DE NOVO 139, 141-49 (2010); see also Michael Anthony Lawrence, *Rescuing the Fourteenth Amendment Privileges or Immunities Clause: How "Attrition of Parliamentary Processes" Begat Accidental Ambiguity; How Ambiguity Begat Slaughter-House*, 18 WM. & MARY BILL RTS. J. 445, 447 (2009) (suggesting the ambiguity regarding "U.S. citizenship" versus "state citizenship" in the first two clauses of the Fourteenth Amendment, Section 1, was the result of a circumstantial accident during the congressional drafting process).

<sup>179</sup> See, e.g., *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (regarding the Due Process Clause's protection against state infringement of property rights); *Twining v. New Jersey*, 211 U.S. 78, 99-101 (1908) (regarding the Due Process Clause's protection against state infringement of Bill of Rights generally).

<sup>180</sup> *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>181</sup> *Id.* at 666 (citation omitted).

<sup>182</sup> Bill of Rights provisions incorporated before the 1953 beginning of the Warren Court era include the First Amendment's religion, press, and assembly clauses, the Fourth Amendment's unreasonable searches and seizures clause, and the Sixth Amendment's public trial and notice of accusation clauses. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (religion); *Near v. Minnesota*, 283 U.S. 697 (1931) (press); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (assembly); *Wolf v. Colorado*, 338 U.S. 25 (1949) (search and seizure); *In re Oliver*, 333 U.S. 257 (1948) (public trial/notice of accusation).

particular right “is fundamental—whether, that is, . . . [it] is necessary to an Anglo-American regime of ordered liberty.”<sup>183</sup>

It seems only fair and proper that such Bill of Rights protections would apply to any form of government—it makes little difference, after all, to a person whose speech has been officially silenced, for example, whether the silencing was performed by the federal or a state government. Either way, the person is being prevented by government from speaking—a seemingly clear violation of the First Amendment. Yet by the time Earl Warren joined the Court in 1953, only a handful of Bill of Rights provisions had been applied to the states.<sup>184</sup> In the 18-year span from when Earl Warren became Chief Justice until two years after his 1969 retirement, by contrast, the Court incorporated an additional dozen provisions (mostly involving criminal procedure).<sup>185</sup>

The “Warren Court revolution” gave new configuration to the entire constitutional landscape,<sup>186</sup> fundamentally changing the face of criminal justice in America. After these additional Bill of Rights provisions had been incorporated, no longer could states use evidence that had been seized by the police in the course of an unreasonable search,<sup>187</sup> for example, and police would now be required to have a lawful warrant in order to search or seize persons, places, or things (Fourth Amendment).<sup>188</sup> In addition, no longer could a state use a defendant’s refusal to testify as evidence of guilt,<sup>189</sup> nor could a state try a person more than once

<sup>183</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968). On similar reasoning, in a companion case to *Brown*, the Warren Court “reverse-incorporated,” through the Fifth Amendment’s Due Process Clause, the Fourteenth Amendment’s Equal Protection Clause (which applies textually only to *state* governments) so that the Equal Protection Clause would apply also to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

<sup>184</sup> See *supra* note 182 and accompanying text.

<sup>185</sup> Most of the incorporation cases came following Felix Frankfurter’s 1962 retirement. See *infra* notes 187-197 and accompanying text. Thereafter, Warren, Brennan, and the Court’s more liberal wing (Arthur Goldberg, Abe Fortas, and Thurgood Marshall) were able to consolidate their positions. Scheiber, *supra* note 2, at 10-12.

<sup>186</sup> Schieber, *supra* note 2, at 11.

<sup>187</sup> *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961). Warren viewed *Mapp*’s extension of the exclusionary rule to the states as “the only way . . . [to] control governmental misadventure” and to assure all persons, including the innocent, of effective protection of their rights in criminal-justice processes in the states.” Scheiber, *supra* note 2, at 13.

<sup>188</sup> *Ker v. California*, 374 U.S. 23 (1963); *Aguilar v. Texas*, 378 U.S. 108 (1964). Not all Warren Court decisions went against the states and police. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding the “reasonableness” standard (versus probable cause) for stop-and-frisk).

<sup>189</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). *Miranda*, which “was entirely [Warren’s]” according to Justice Fortas, “was the ultimate embodiment of the Warren fairness approach.” SCHWARTZ, *supra* note 72, at 589, 628.

for the same offense (Fifth Amendment).<sup>190</sup> A state would now be required to provide a speedy trial<sup>191</sup> (by jury<sup>192</sup>) to a criminal defendant, who is entitled to receive the assistance of legal counsel<sup>193</sup> and the opportunity to compel the appearance of favorable witnesses<sup>194</sup> and to confront adverse witnesses (Sixth Amendment).<sup>195</sup> No longer could states impose excessive bail or cruel and unusual punishments (Eighth Amendment),<sup>196</sup> and finally, the First Amendment right to petition for redress of grievances was applied to the states.<sup>197</sup>

Of course, there were many critics of the Warren Court's assertive posture in incorporating virtually all of the Bill of Rights' criminal procedural requirements to apply against the states. Many believed the Court's actions would ultimately contribute to a rise in crime, to which Warren later responded: "Thinking persons and especially lawyers know that this is not the fact. They know that crime is inseparably connected with factors such as poverty, degradation, sordid social conditions, and weakening of home ties, low standards of law enforcement and the lack of education."<sup>198</sup>

More fundamentally, conservative critics lamented the progressive Warren Court's "assault" on state sovereignty. The Court was criticized for being too "judicial[ly] activ[e]"<sup>199</sup>—turning the tables on the progressives' and liberals' criticisms of the conservative *Lochner*-era Court a half century earlier for its assertive posture in overturning hundreds of federal and state laws in promotion of its vision of economic liberty.<sup>200</sup>

Professor Vicki Jackson suggested, however, that the opinions reveal that the Court was not actually insensitive to the states, but rather, was deeply troubled by local police actions that failed to adhere to basic constitutional concepts of fairness and

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<sup>190</sup> *Benton v. Maryland*, 395 U.S. 784, 793-94 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)); SCHWARTZ, *supra* note 72, at 742.

<sup>191</sup> *Klopfer v. North Carolina*, 386 U.S. 213, 218-19, 222-23, 226 (1967).

<sup>192</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>193</sup> *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963). "[F]ew people realize that the *Gideon* decision resulted directly from Warren's [initiative]," Schwartz reported. "[T]he Chief's new law clerks [in 1961] were instructed by one of the prior term's clerks, 'Keep your eyes peeled for a right to counsel case. The Chief feels strongly that the Constitution requires a lawyer.'" SCHWARTZ, *supra* note 72, at 457-58.

<sup>194</sup> *Washington v. Texas*, 388 U.S. 14, 18-19 (1967).

<sup>195</sup> *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

<sup>196</sup> *Robinson v. California*, 370 U.S. 660, 667 (1962).

<sup>197</sup> *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

<sup>198</sup> CRAY, *supra* note 1, at 462 (quoting Warren).

<sup>199</sup> See generally PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970) (criticizing the Warren Court's activist jurisprudence).

<sup>200</sup> Scheiber, *supra* note 2, at 19.

human dignity.<sup>201</sup> Simply put, “[t]here is a less consistent sense that [the Warren Court believed] all rights and remedies should be nationalized than a sense that states were doing specific things quite wrongly, that needed to be fixed.”<sup>202</sup>

Paradoxically, the Warren Court decisions supposedly infringing on state sovereignty may have actually worked to strengthen it. “[B]y providing the impetus for a more democratically legitimate form of state government, [the reapportionment decisions] helped contribute to a revival of states as a locus of reform (and thence to the more aggressive judicially enforced federalism in the late twentieth and early twenty-first centuries).”<sup>203</sup> In short, the Warren Court’s efforts left federalism healthier than before, affording many more people the opportunity to participate in all aspects of the political process.<sup>204</sup>

## 2. Privacy

Beyond reading the Due Process Clause to apply most of the Bill of Rights to the states, the Warren Court also began interpreting the clause to encompass a broader range of substantive rights. In 1968, in *Loving v. Virginia*, the Court struck down a state statute punishing interracial marriage. “The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival,”<sup>205</sup> wrote Chief Justice Warren for a unanimous Court. “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.”<sup>206</sup> *Loving* thus epitomizes the Warren Court’s expansive

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<sup>201</sup> Jackson, *supra* note 115, at 147-48 (further stating that the cases “suggest[] that the Court’s purposes were not to displace state authority as such but to establish a minimum judicially enforceable floor of federal standards”).

<sup>202</sup> *Id.* at 141, 150 (stating, “It would be well to remember[, for example,] the record of infringement of the Fourth Amendment that confronted the Court in *Mapp* and its predecessors”).

<sup>203</sup> *Id.* at 139.

<sup>204</sup> *Id.* at 140.

<sup>205</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

<sup>206</sup> *Id.* The Court also struck down the law on equal protection grounds: “There can be no question but that Virginia’s miscegenation statutes rest solely upon distinctions drawn according to race. . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” *Id.* at 11-12.

reading of social liberty—a reading that fits nicely into the Rawlsian justice-as-fairness framework.

More controversially, the Warren Court found an implicit “right of privacy” in the 1965 case, *Griswold v. Connecticut*.<sup>207</sup> In *Griswold*, the Court struck down a Connecticut statute prohibiting the use and distribution of contraceptives. Writing for the Court, Justice Douglas explained that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy . . . [and] penumbral rights of ‘privacy and repose.’”<sup>208</sup> In finding a privacy right in this case, the Court wondered: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”<sup>209</sup>

*Griswold* has been roundly criticized by (primarily) conservative commentators, who argue that the Court should not recognize a right of privacy since the Constitution does not expressly recognize such a right. Justice Goldberg’s concurring opinion (joined by Chief Justice Warren and Justice Brennan) thoroughly negates such objections, however, by highlighting the Ninth Amendment’s dictate that, “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>210</sup> Justices Goldberg, Warren, and Brennan explained, “The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold.” The right of privacy in marriage is “basic and fundamental and so deep-rooted in our society,” that for any person to suggest that it is *not*, just because the Bill of Rights does not expressly state the same, “is to ignore the Ninth Amendment and to give it no effect

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<sup>207</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>208</sup> *Id.* at 484-85 (citations omitted). The Court identified a number of such protections, such as the zone of privacy right of association (found in penumbra of First Amendment), the zone of privacy not to have soldiers quartered in one’s home (Third Amendment), the zone of privacy to be protected against unreasonable searches and seizures (Fourth Amendment), and the zone of privacy not to be required to testify against oneself (Fifth Amendment). *Id.* at 484.

<sup>209</sup> *Id.* at 485-86 (stating this is “a right of privacy older than the Bill of Rights—older than our political parties, older than our school system”). Separate, concurring opinions by Justices Harlan and White took a narrower approach, suggesting that the privacy interest at issue was instead the sort of “liberty” protected by the Due Process Clause because it “violates basic values ‘implicit in the concept of ordered liberty.’” *Id.* at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)) (further stating that “[t]he Due Process Clause of the Fourteenth Amendment stands . . . on its own bottom”).

<sup>210</sup> U.S. CONST. amend. IX.

whatsoever.”<sup>211</sup> The concurring Justices did not stop there, however, instead going further to suggest that any judge failing to recognize the right would run afoul of the Constitution:

Moreover, a judicial construction that this fundamental right is not protected . . . because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>212</sup>

Regrettably, even half a century later, the Supreme Court today fails to assertively enforce the understanding that the Ninth Amendment creates an expansive definition of liberty and equal justice—the sort of definition, incidentally, that would comport well with John Rawls’s justice-as-fairness theory.<sup>213</sup> The Goldberg/Warren/Brennan *Griswold* concurrence remains the Supreme Court’s most detailed acknowledgement of the Ninth Amendment’s robust mandate.

That said, the various opinions in *Griswold* laid the groundwork for the Court’s subsequent broader recognition of the Due Process Clause’s role in protecting fundamental—and other constitutionally protected—rights, such as a woman’s right to choose abortion,<sup>214</sup> the right to be free of unwanted medical treatment,<sup>215</sup> the right to engage in private sexual activity of one’s choice,<sup>216</sup> and most recently, the right of same-sex couples to marry.<sup>217</sup>

### *E. Constitutional Bases: First Amendment*

Some suggest that the Warren Court was not as stalwart on matters involving the First Amendment’s protection of speech, association, and religion. First Amendment scholar William Van

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<sup>211</sup> *Griswold*, 381 U.S. at 491 (Goldberg, J., concurring).

<sup>212</sup> *Id.* at 491-92 (Goldberg, J., concurring) (quoting U.S. CONST. amend. IX) (further explaining that the Ninth Amendment “is almost entirely the work of James Madison. It was introduced in Congress by him and passed [easily by] the House and Senate . . . . These statements of Madison and [Justice Joseph] Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people”).

<sup>213</sup> See generally Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) (stating the Ninth Amendment’s requirement that “the unenumerated (natural) rights that people possessed prior to the formation of government, and which they retain afterwards, should be treated in the same manner as those (natural) rights that were enumerated in the Bill of Rights”).

<sup>214</sup> *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (upholding *Roe v. Wade*, 410 U.S. 113 (1973)).

<sup>215</sup> *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

<sup>216</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>217</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).



Alstyne suggests that the Court took too long in asserting the judiciary's role in curbing congressional overreach (and corresponding infringement of speech and association rights) in matters involving the national interest, for example.<sup>218</sup> Too often in its early years, the Warren Court resorted to narrow procedural or statutory interpretations to avoid reaching First Amendment issues in cases involving communists and other alleged subversives.<sup>219</sup>

In *Walker v. Birmingham*, for example, the Court affirmed the Reverend Martin Luther King Jr.'s and other civil rights activists' criminal contempt convictions for defying an Alabama state court order not to march.<sup>220</sup> Reasoning that "respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom," the Court said the activists should have sought instead to have the injunction set aside by a higher court.<sup>221</sup>

Chief Justice Warren, Justice Brennan, and Justice Fortas dissented, with Warren asserting, "I do not believe that giving this Court's seal of approval to such a gross misuse of the judicial process is likely to lead to greater respect for the law."<sup>222</sup> Warren believed the law was unconstitutional on its face because it lacked any sort of standards and worried that jailing Reverend King for engaging in protected speech would cause people to lose faith in the fairness of the judicial process.<sup>223</sup>

Despite its reticence on some First Amendment issues, the Warren Court did eventually seriously consider matters of fairness and equity in handing down a number of key First Amendment opinions. Against the backdrop of McCarthy-era witch hunts, for example, the Court decided a series of freedom of association cases and reversed the convictions of (real or imagined) communists and their sympathizers.<sup>224</sup> Critics, including FBI Director J. Edgar Hoover, began referring to the day when the Court issued four of these cases, June 17, 1957, as "Red Monday."<sup>225</sup> In one of those cases, *Yates v. United States*,<sup>226</sup> the

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<sup>218</sup> Scheiber, *supra* note 2, at 13-14 (paraphrasing William Van Alstyne).

<sup>219</sup> *Id.*

<sup>220</sup> *Walker v. Birmingham*, 388 U.S. 307 (1967).

<sup>221</sup> *Id.* at 307, 309, 311-12, 321.

<sup>222</sup> *Id.* at 330 (Warren, C.J., dissenting).

<sup>223</sup> SCHWARTZ, *supra* note 72, at 632-33.

<sup>224</sup> "The law clerks starting kidding each other about the fact that we had the Communists before us in at least a dozen or more cases and they were winning every one," recalled a Warren law clerk about the end of the 1956 Term. *Id.* at 280.

<sup>225</sup> CRAY, *supra* note 1, at 332-38.

<sup>226</sup> *Yates v. United States*, 354 U.S. 298 (1957). The other three cases handed down the same day were *Watkins v. United States*, 354 U.S. 178 (1957) (reversing conviction of a labor leader for declining to discuss his associations and beliefs and

Court reversed the convictions of individuals who had been charged, essentially because of their membership in the Communist Party, with conspiracy to overthrow the U.S. government by force. Writing for the majority, Justice Harlan said the district court had not properly differentiated between advocacy for an abstract idea and advocacy for action to bring about the idea.<sup>227</sup> “The essential distinction,” he said, “is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something.”<sup>228</sup> By drawing a hard line between advocacy (protected) and action (not protected), the Supreme Court precipitated the end of Congress’s McCarthy-era witch hunts.<sup>229</sup>

The landmark case of *New York Times Co. v. Sullivan*<sup>230</sup> was a bulwark for freedom of speech and of the press.<sup>231</sup> In *Sullivan*, the Warren Court struck down an Alabama state court award of \$500,000 in damages to a plaintiff city commissioner who claimed defamation due to certain trivial factual inaccuracies in an advertisement placed in the *New York Times* by civil rights activists.<sup>232</sup> Writing for a unanimous Court, Justice Brennan explained that the Constitution prevents a public official from recovering damages for defamation unless he or she “proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>233</sup> The Court reasoned that “erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”<sup>234</sup> The Warren Court thus created a framework for protecting the ability of anyone—individuals, groups, and the press alike—to criticize the government or other public figures without fear of legal repercussions.

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placing limits on House Un-American Activities Committee), *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (holding state investigation into alleged subversive activities violates Due Process Clause), and *Service v. Dulles*, 354 U.S. 363 (1957) (finding invalid the discharge of diplomat who had been released for disloyalty in violation of the State Department’s own procedures).

<sup>227</sup> *Yates*, 354 U.S. at 320.

<sup>228</sup> *Id.* at 324-25.

<sup>229</sup> See, e.g., SAMUEL WALKER, *PRESIDENTS AND CIVIL LIBERTIES FROM WILSON TO OBAMA: A STORY OF POOR CUSTODIANS* 196-97 (2012).

<sup>230</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>231</sup> *Id.* at 256.

<sup>232</sup> *Id.* at 256-59, 264.

<sup>233</sup> *Id.* at 279-80.

<sup>234</sup> *Id.* at 271-73 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (further stating, “Criticism of . . . [government officials] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations”).

In the same vein, the Warren Court's sympathetic position regarding the antiwar protests of the 1960s largely mirrored the views of the Chief Justice (who himself observed that "[t]his is a country that was born in protest"), who suggested that the protests "may prove effective in shaking the Establishment out of complacency and smugness."<sup>235</sup> In *Tinker v. Des Moines Independent Community School District*,<sup>236</sup> for example, the Court held that the act of students wearing black armbands to protest the Vietnam War was the sort of expressive conduct—similar to "pure speech"—protected by the First Amendment.<sup>237</sup>

Finally, the Warren Court established the highly speech-protective "clear and present danger" standard for incitement of illegal activity, a standard that survives to this day. In *Brandenburg v. Ohio*,<sup>238</sup> the Court reversed the convictions of Ku Klux Klan members who had burned a cross and chanted racist threats and epithets at a meeting held on a farm outside Cincinnati, reasoning that under the constitutional grants of freedom of speech and of the press, a state cannot prevent advocacy for the use of force unless that advocacy was used or was likely to incite "imminent lawless action."<sup>239</sup> The Warren Court thus "completed the Court's long journey toward the embrace of radical speech" and "declared that speech triumphed over fear."<sup>240</sup>

On matters of First Amendment religious freedom, the Warren Court was both bold and highly controversial. In a school prayer case, *Engel v. Vitale*,<sup>241</sup> for example, the Court found short opening prayers in public schools to be unconstitutional abridgements of the Establishment Clause. Writing for the Court, Justice Black reasoned that

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<sup>235</sup> CRAY, *supra* note 1, at 487 (quoting Warren, who added, "[P]rotest is] a way people have of bringing about progress"). Warren "seemed to understand the protest movement," recalled Warren's law clerk, Paul Meyer. *Id.* Meyer added, "[f]or a man of his age, my expectation would have been that Warren would be more narrow-minded than he was, more fixed in a lot of positions than he was." *Id.*

<sup>236</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>237</sup> *Id.* at 505-06; *see also* *United States v. O'Brien*, 391 U.S. 367, 375-77, 382 (1968) (determining that the conduct of burning a draft card in opposition to the Vietnam War was sufficiently expressive in nature to merit a measure of protection under the First Amendment and finding, on the facts, that the government met its burden, and thus upholding O'Brien's conviction for burning his draft card in violation of federal law).

<sup>238</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>239</sup> *Id.* at 447-48 (explaining that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action" (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961))).

<sup>240</sup> NEWTON, *supra* note 64, at 504; *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

<sup>241</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.<sup>242</sup>

Across the country, reaction to the holding was intense, prompting the largest volume of critical mail to the Court in its history. Warren himself recalled, "I vividly remember one bold newspaper headline, 'Court Outlaws God.'"<sup>243</sup> Condemning the Court, unhappy religious leaders communicated their "shock and regret."<sup>244</sup> Indeed, the Warren Court's position in *Engle v. Vitale* even turned the popular minister Billy Graham off to the Court.<sup>245</sup>

Finally, in *United States v. Seeger*,<sup>246</sup> a Vietnam War-era case, the Warren Court broadly interpreted the First Amendment's protection of free exercise of religion to allow a religiously agnostic person to claim statutory conscientious objector status and thus avoid the military draft. The Court explained, "[A]ny person opposed to war on the basis of a sincere belief, which in his life fills the same place as a belief in God fills in the life of an orthodox religionist, is entitled to exemption under the statute."<sup>247</sup> Chief Justice Warren joined the majority, commenting at conference, "Seeger believed 'in a guiding spirit and that's enough to give [him] the exemption. I don't know how to define 'Supreme Being' and judges perhaps ought not do so.'"<sup>248</sup> This nonjudgmental cognizance of individual autonomy and diversity of views—religious and nonreligious alike—epitomizes the approach encouraged by John Rawls's original position-of-equality formulation and sets a standard for judicial respect to which all judges and courts should aspire.

The Warren Court's fairness jurisprudence, grounded primarily in the Fourteenth Amendment's Equal Protection and Due Process Clauses, had a profoundly positive impact on American life. The next part briefly discusses that legacy before concluding that the Warren Court's justice-as-fairness jurisprudence, as augmented by John Rawls's theory of justice, would serve as a useful template for judicial decisionmaking in the twenty-first century.

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<sup>242</sup> *Id.* at 425.

<sup>243</sup> SCHWARTZ, *supra* note 72, at 441 (quoting Warren).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *United States v. Seeger*, 380 U.S. 163 (1965).

<sup>247</sup> *Id.* at 192-93 (Douglas, J., concurring).

<sup>248</sup> SCHWARTZ, *supra* note 72, at 570.

### III. THE WARREN COURT'S LEGACY: RAWLSIAN JUSTICE-AS-FAIRNESS AS JUDICIAL GUIDING PRINCIPLE

The Warren Court's legacy is imposing. Although the Court was hugely controversial in its day, its "great moral teaching," *Brown v. Board of Education*, "remains the ideal; the United States shall not be two societies, separate and unequal,"<sup>249</sup> reflects Warren biographer Ed Cray. The benefits to redistricting accomplished by the reapportionment cases persist, and despite its widely contested beginnings, the concept of "one person, one vote" has become firmly implanted in the public consciousness as a core feature of basic fairness in the political system.<sup>250</sup> In criminal law, basic rights against self-incrimination and unreasonable search and seizure, as well as rights to legal representation, were finally given full force—against state and local governments as well as against the federal government—during the Warren Court years.<sup>251</sup>

These axioms, in addition to the decisions that quelled the McCarthy-era communist witch hunts and gave meaning to the First Amendment's separation of church and state by forbidding prayer in public schools, have become integral threads in the American legal fabric. The enduring breadth and scope of the Warren Court's decisions is striking.<sup>252</sup> Indeed, with its embrace, both expressly and implicitly, of basic concepts of human rights and public virtue, the Court made impressive progress in pursuing the ideals of fairness and equal justice.<sup>253</sup> These Warren Court concepts, as further informed by John Rawls's "justice-as-fairness" formulations, can provide useful tools for judicial decisionmaking in the twenty-first century.

#### A. *Opposition and Support*

The Warren Court was nothing if not polarizing. On one hand, its supporters and adherents sang the Court's praises for addressing long-neglected principles of fairness and equal justice. Meanwhile, its opponents were unrelenting in their criticism, thinking the Court "too doctrinaire, too eager to right what it takes to be wrong, too much concerned with grand abstractions of liberty at the expense of the orderly growth and continuity of the

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<sup>249</sup> CRAY, *supra* note 1, at 530.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> NEWTON, *supra* note 64, at 517.

<sup>253</sup> Scheiber, *supra* note 2, at 21.

law.”<sup>254</sup> Whether “enlightened” or “unprincipled,” the Warren Court engendered passionate opinions on both sides.

### 1. Opposition

Any account of the Warren Court would be incomplete without mentioning the wrath it engendered among its critics. The heavy criticism began in the Warren Court’s very first year with its decision in *Brown v. Board of Education* and continued with varying levels of intensity throughout the next 16 years.<sup>255</sup> Professor Gary McDowell said, for example, “Since *Brown*, the Court has continued to expand, and to confuse the public perception of, its power of equity. The result has been to substitute social-science speculation for precedent and principle as the standard of both constitutional meaning and equitable relief.”<sup>256</sup> *Brown* was only the beginning, however.

As the Court in the mid-1950s began undoing the McCarthy era’s damaging excesses by reversing trumped-up convictions of communists and their alleged sympathizers (culminating with Red Monday on June 17, 1957),<sup>257</sup> opponents’ denunciations intensified. The widely circulated book, *Nine Men Against America: The Supreme Court and Its Assault on American Liberties*,<sup>258</sup> for example, asserted that on Red Monday, “[t]he Court really went to town—amid the cheers and hurrahs of the communist conspirators.”<sup>259</sup>

<sup>254</sup> CRAY, *supra* note 1, at 436 (quoting *Newsweek*).

<sup>255</sup> Perhaps it was inevitable that the Warren Court triggered fierce opposition for its progressive approach. Throughout the millennia, institutions and individuals who have upset the well-settled, entrenched, too-often-unfair practices of the ruling classes have encountered intense resistance. Witness, for example, the hardships encountered by the brave individuals who have led the way throughout 400 years of American history in agitating against the discriminatory and unfair practices of the particular day’s status quo. See MICHAEL ANTHONY LAWRENCE, *RADICALS IN THEIR OWN TIME: FOUR HUNDRED YEARS OF STRUGGLE FOR LIBERTY AND EQUAL JUSTICE IN AMERICA* (2011) (discussing the contributions of Roger Williams (d.1683), who advocated for religious liberty of conscience; Thomas Paine (d.1809), who promoted political and individual rights; Elizabeth Cady Stanton (d.1902), who agitated for women’s rights; W.E.B. Du Bois (d.1963), who argued for black rights; and Vine Deloria, Jr. (d.2005), who advocated for Native American rights).

<sup>256</sup> MCDOWELL, *supra* note 116, at 9.

<sup>257</sup> See *supra* notes 224-229 and accompanying text; CRAY, *supra* note 1, at 336-37.

<sup>258</sup> ROSALIE M. GORDON, *NINE MEN AGAINST AMERICA: THE SUPREME COURT AND ITS ATTACK ON AMERICAN LIBERTIES* (1958).

<sup>259</sup> SCHWARTZ, *supra* note 72, at 250 (quoting GORDON, *supra* note 258, at 128). Regarding Red Monday, the book asserted,

“Chief Justice Warren . . . took away from congressional investigating committees their freedom of inquiry [in *Watkins*];” in *Sweezy* “he nailed down the clamp . . . on the rights of the states to protect their students against subversive teachers”; and *Yates* “makes it practically impossible to prosecute conspirators against America.”

Fueled by *Nine Men*, the first efforts to impeach Earl Warren began with the obscure Cinema Educational Guild in September 1957, and continued with such groups as the John Birch Society for the next decade or more.<sup>260</sup> "Impeach Earl Warren" signs were ubiquitous along the nation's roads and highways, and members of Congress received volumes of letters favoring impeachment. Flyers urging impeachment were even seen at Earl Warren High School in Downey, California, and during these years, Warren was frequently accosted at public functions by shouting protestors who would sometimes throw their "Impeach Earl Warren" signs at him.<sup>261</sup> The Georgia state legislature got into the act, too, voting to impeach Warren and the other Justices for committing "high crimes and misdemeanors."<sup>262</sup>

It was not only anticommunists and segregationists who were opposed to the progressive Warren Court; business groups like the National Association of Manufacturers and the National Chamber of Commerce were also critical of the Court's perceived "antibusiness" posture on antitrust and labor issues.<sup>263</sup> Congress debated the Jenner-Butler bill (thwarted eventually by efforts led by Senate majority leader Lyndon B. Johnson), which would have removed the Court's appellate jurisdiction in security cases.<sup>264</sup> Even President Eisenhower, who had earlier opposed the school desegregation decisions,<sup>265</sup> jumped in, reportedly proclaiming that his appointment of Earl Warren as Chief Justice "was the biggest damn fool thing I ever did."<sup>266</sup>

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*Id.* (quoting GORDON, *supra* note 258, at 128-30).

<sup>260</sup> CRAY, *supra* note 1, at 389-91; SCHWARTZ, *supra* note 72, at 250.

<sup>261</sup> SCHWARTZ, *supra* note 72, at 281-82, 627. For his part, Warren himself maintained a sense of humor. "Just below his framed commission as Chief Justice . . . on his library wall, there hung the 1965 *New Yorker* cartoon showing an indignant caricature of *Whistler's Mother* frantically embroidering a sampler, 'IMPEACH EARL WARREN,'" reports Schwartz. "According to one of his sons, 'It really breaks him up.' Warren himself laughingly told a Southern law clerk that, if he was fired by the Chief, he could go back home and run for Governor unopposed on both parties' tickets." *Id.* at 281-82 (footnote omitted).

<sup>262</sup> *Id.* at 250.

<sup>263</sup> CRAY, *supra* note 1, at 322.

<sup>264</sup> SCHWARTZ, *supra* note 72, at 280; NEWTON, *supra* note 64, at 365-66.

<sup>265</sup> CRAY, *supra* note 1, at 337. "Eisenhower . . . regarded racial segregation as being so ingrained in social mores and long accepted in the law that the Court ought not to 'meddle' with it." Scheiber, *supra* note 2, at 5. Warren and the rest of the Justices resented Eisenhower's lack of support. William Douglas, for example, placed blame for the South's resistance to *Brown* squarely at the President's feet, commenting in his autobiography, "[Eisenhower's] ominous silence on our 1954 decision gave courage to the racists who decided to resist the decision ward by ward, precinct by precinct, town by town, and county by county." SCHWARTZ, *supra* note 72, at 175 (quoting William Douglas).

<sup>266</sup> CRAY, *supra* note 1, at 337. Despite the President's alleged disdain, during the Red Monday furor he "called on the nation to respect the Supreme Court, which he termed 'one of the great stabilizing influences of this country.'" SCHWARTZ, *supra* note 72, at 250.

By the early 1960s, 32 state legislatures had approved resolutions for a constitutional convention to discuss, among other things, the Warren Court's apportionment decisions.<sup>267</sup> Erwin Griswold, Harvard Law School dean, weighed in, stating, "The Supreme Court is as good a way as man has ever invented to resolve judicial problems—but I very much doubt that it's a good way to resolve political problems."<sup>268</sup>

In 1964, Republican presidential nominee Senator Barry Goldwater accused the Warren Court of being the least faithful among the three branches of government to the principle of limited government and charged the Court with jeopardizing social order "just to give criminals a sporting chance to go free."<sup>269</sup> Stating that he would scrap the Court's criminal law decisions if elected, Goldwater further pledged to nominate to the Supreme Court only "seasoned men who will support the Constitution."<sup>270</sup>

Specific criticism of the Warren Court's approach to state-federal relations long abounded. In a 1958 report, the unofficial Conference of State Chief Justices criticized the Warren Court for systematically moving power to the federal government from the states and for improperly making policy with its decisions.<sup>271</sup> The Warren Court's incorporation decisions of the 1960s just added fuel to the fire, to the point where there was a serious possibility for passage of a proposal, supported by many state legislatures, to gather the 50 state chief justices into a so-called Court of the Union. This new Court would be tasked with the authority to reverse Supreme Court decisions—a prospect that Earl Warren found particularly threatening.<sup>272</sup> As we shall see, however, many did not share such negative opinions of the Warren Court.

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<sup>267</sup> CRAY, *supra* note 1, at 436. Thirty-four states would be the minimum required to call a convention. U.S. CONST. art. V.

<sup>268</sup> CRAY, *supra* note 1, at 436. The *U.S. News & World Report* observed critically after Earl Warren's 10-year Supreme Court anniversary that "the trend of the Warren Court in using its judicial authority to promote change in more and more fields shows no sign of abating." *Id.* at 410 (quoting *U.S. News & World Report*). Congress expressed its disapproval after the 1963 Term by limiting the Supreme Court Justices' pay raise to \$4,500 even while providing a full \$7,500 for other federal judges. SCHWARTZ, *supra* note 72, at 542.

<sup>269</sup> SCHWARTZ, *supra* note 72, at 542 (quoting Sen. Goldwater).

<sup>270</sup> *Id.* (quoting Sen. Goldwater).

<sup>271</sup> CRAY, *supra* note 1, at 352. The vote count among the state supreme court chief justices was 36-8 in favor of adopting the critical report. *Id.*

<sup>272</sup> CRAY, *supra* note 1, at 391.



## 2. Support

Even while the Warren Court endured much criticism, it was also the object of copious high praise. Characterizing June 15, 1964, when the Court handed down *Reynolds v. Sims* (mandating that all voting districts must be apportioned on the basis of "one person, one vote"),<sup>273</sup> as "one of the great days in the Supreme Court's history," for example, the esteemed *New York Times* reporter Anthony Lewis asked rhetorically, "Where would we be today if the Supreme Court had not been willing ten years ago to tackle the great moral issue of racial discrimination that Congress had so long avoided?"<sup>274</sup>

For its part, around the same time, the *Washington Post* editorialized, "[N]ot since the formative days of the Republic when John Marshall presided over its deliberation has the Supreme Court played so dynamic a part in American affairs as during the dozen years since Earl Warren became Chief Justice of the United States [Supreme Court]."<sup>275</sup> Recalling the period shortly after Warren's retirement, journalist Jim Newton stated, "[T]he early 1970s were full of reminders of Warren's esteem, as the Warren Court pivoted from its place as object of controversy to one of lionization and nostalgia."<sup>276</sup> It is no exaggeration to say that among its more ardent admirers, the Warren Court was a savior of sorts for the Constitution's concept of equal justice under the law.

The Warren Court's influence spread abroad, as well. In other countries, among the most admired aspects of the Court's jurisprudence was its commitment to criminal defendants' due process rights.<sup>277</sup> Reformers in Latin America, Canada, and elsewhere looked to the Warren Court as an inspirational judicial exemplar and agent for political and social change. In particular, the Court promoted the notion that judges could take principled stands against the executive and legislative branches of government in furtherance of protecting the less advantaged.<sup>278</sup>

Earl Warren himself, as the face of the Supreme Court that through a decade and a half of progressive jurisprudence created a more fair, just, and humane America, received many

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<sup>273</sup> See *supra* notes 161-171 and accompanying text.

<sup>274</sup> SCHWARTZ, *supra* note 72, at 507 (quoting Anthony Lewis).

<sup>275</sup> CRAY, *supra* note 1, at 478.

<sup>276</sup> NEWTON, *supra* note 64, at 510.

<sup>277</sup> Scheiber, *supra* note 2, at 22-23 (stating that "[a] line of provisions in the 1987 Korean constitution and subsequent decisions of its constitutional court read like a catalogue of the major reforms that the Warren Court imposed on America's law of criminal procedure").

<sup>278</sup> *Id.* at 22-24.

personal plaudits as well. The *St. Louis Post-Dispatch* reported in 1966, for example, that “[m]ore and more, Justice Warren is being hailed as one of the great Chief Justices in history, a towering figure ranking with John Marshall and Charles Evan Hughes.” The *New York Times Magazine* labeled him “the greatest Chief Justice in the nation’s history,” period.<sup>279</sup>

Internationally, from the time he delivered the Court’s unanimous opinion in *Brown v. Board of Education* in 1954, Warren was virtually lionized. “Within an hour of the [Brown] decision, the Voice of America broadcast announced the opinion,” wrote Cray. “Before nightfall, reports of *Brown* in thirty-four languages proclaimed the ruling a victory in the diplomatic war between East and West for the allegiance of unaligned nations.”<sup>280</sup> The *San Francisco Chronicle* opined, “[t]o the vast majority of the peoples of the world who have colored skins, it will come as a blinding flash of light and hope.”<sup>281</sup> “[Warren] has emerged,” observed *Washington Post* columnist John P. Mackenzie, “as a world figure and symbol of an American commitment to equal justice to all races and income levels.”<sup>282</sup> The Conferences on World Peace Through the Law, upon awarding Warren its first Human Rights Award in 1973, commented, “When history reviews the record of our day in terms of man, leadership and their accomplishment in advancing human rights, no name will loom larger than that of Earl Warren.”<sup>283</sup> Solicitor General J. Lee Rankin recalled, “When you travel . . . , you realize [Warren] is the best-known American in the world. The new nations of Asia and Africa call him a saint—the greatest humanitarian in the Western Hemisphere since Abraham Lincoln,” and jurists worldwide prominently placed on their office walls photographs of themselves with Chief Justice Warren.<sup>284</sup>

## B. Human Rights and Public Virtue

A palpable subtext running through the Warren Court’s jurisprudence (also clearly apparent in John Rawls’s justice-as-

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<sup>279</sup> CRAY, *supra* note 1, at 478; see also NEWTON, *supra* note 64, at 510 (stating, “Warren himself was regularly included in any short list of great justices, sometimes joined only by Marshall and Charles Evan Hughes when ranked against history’s other chief justices”).

<sup>280</sup> CRAY, *supra* note 1, at 292.

<sup>281</sup> *Id.* (quoting the *San Francisco Chronicle* and further stating, “*Brown* unexpectedly raised the man who made that possible into a world figure”).

<sup>282</sup> *Id.* at 479.

<sup>283</sup> *Id.* at 515. At the same conference two years earlier, Warren was recognized “for his landmark decisions upholding human rights which have justly earned him worldwide esteem as a champion of the liberty of man.” *Id.*

<sup>284</sup> *Id.* at 293.

fairness theory) was its recognition of basic human rights and its acknowledgment of the importance of public virtue in civil society.

### 1. Human Rights

Concern for human rights and dignity had increased in the years following the atrocities of World War II, and the Warren Court reflected this heightened global awareness.<sup>285</sup> The Court's incorporation cases<sup>286</sup> "rais[ed] the floor of basic constitutional norms designed to protect individuals from unfair treatment by any government, state or federal [actor], . . . [and] can be seen as harbingers of what has become a more generalized human rights consciousness among jurists around the world."<sup>287</sup>

*Brown v. Board of Education* in 1954 was the first Warren Court case to suggest that human dignity was a constitutional principle, holding that official school segregation was unconstitutional because it caused among blacks "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."<sup>288</sup> This constitutional principle was then further emphasized in the civil rights movement of the 1960s, when both the legislative and executive branches extended their commitment to *Brown's* principles through the promotion and passage of legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>289</sup>

As noted, Chief Justice Warren was willing to move the Court in unprecedentedly assertive ways to impose upon the states the human rights principles contained first in the Fourteenth Amendment's Equal Protection Clause (*Brown*)<sup>290</sup> and later the Bill of Rights (the incorporation cases).<sup>291</sup> In principle, Warren understood the Constitution's commitment to a federalist system where the national and state governments share power. He did not, however, believe that federalism as a concept was so static as to require the same sort of state-national balance that existed at the time of the framing, the Reconstruction amendments, or any

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<sup>285</sup> Jackson, *supra* note 115, at 139.

<sup>286</sup> See *supra* notes 173-204 and accompanying text.

<sup>287</sup> Jackson, *supra* note 115, at 138-39. This consciousness is reflected "in international documents and in the new constitutions adopted in other federal systems such as Germany, India, and, later on, Canada." *Id.* at 138 (footnotes omitted); see also Scheiber, *supra* note 2, at 10-12 (discussing the Warren Court's role in applying, through the process of "incorporation," many Bill of Rights provisions to the states).

<sup>288</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

<sup>289</sup> See, e.g., Bruce Ackerman, *Dignity is a Constitutional Principle*, N.Y. TIMES (Mar. 29, 2014), <http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html> [<http://perma.cc/LT9N-D3JF>].

<sup>290</sup> See *supra* notes 132-148 and accompanying text.

<sup>291</sup> See *supra* notes 173-204 and accompanying text.

other time in the past.<sup>292</sup> Indeed, the Warren Court believed deeply in the U.S. Constitution as an optimistic instrument for advancing equal justice and recognizing human rights in the context of a more modern, globally interconnected world.<sup>293</sup>

## 2. Public Virtue

Another characteristic of the Warren Court was its implicit recognition of the importance of encouraging a sense of “public virtue,” or common good, in society. This principle, time honored from the nation’s founding, is epitomized by Earl Warren’s 1953 comment as he moved from California governor to the U.S. Supreme Court: “I am glad to be going to the Supreme Court because now I can help the less fortunate, the people in our society who suffer, the disadvantaged.”<sup>294</sup>

Time and again, the Court that bore Warren’s name practiced this sort of principled, public-minded altruism, employing principles that would later become associated with John Rawls’s “justice-as-fairness” approach (based on providing fairly for even the least-advantaged members of society). Rawls’s “original position may derive from rules that stress rationality and self-interest,”<sup>295</sup> Professor Bruce Antkowiak explained, “but the veil of ignorance changes societal decision-making from an exercise in selfishness to one of public-mindedness . . . . When the veil [is lifted], a sense of shared, common good emerges that society affirms publicly. In affirming this common good, the society becomes ‘well-ordered.’”<sup>296</sup> This concept would be very familiar to America’s founding generation, which had deeply held ideas of public virtue—or “Public Spirit”—and what constituted virtuous conduct. “Virtue was the common bond that tied together the Greek, Roman, Christian, British, and European ideas of government and politics to which the founders responded.”<sup>297</sup>

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<sup>292</sup> Scheiber, *supra* note 2, at 18.

<sup>293</sup> Jackson, *supra* note 115, at 186-87 (stating, “Sensitivity to international democratic norms was a marked feature in the Warren Court’s jurisprudence,” and noting “[t]he Warren Court’s references to the Universal Declaration [of Human Rights] and to other aspects of the nascent structure of international human rights”). The modern Supreme Court, by contrast, has been much more insular. *Id.* (stating, “[W]e see the emergence of an aggressive strand of hostility expressed, notably by Justice Scalia, to the idea that U.S. constitutional decision making would benefit from considering the legal views or experiences of other countries or international bodies”).

<sup>294</sup> CRAY, *supra* note 1, at 255.

<sup>295</sup> Antkowiak, *supra* note 43, at 601.

<sup>296</sup> *Id.* (footnotes omitted).

<sup>297</sup> Richard Vetterli and Gary Bryner, *Public Virtue and the Roots of American Government*, 27 *BYU STUD.* 29, 29 (1987) (“The idea of virtue was central to the political thought of the founders of the American republic. Every body of thought they encountered, every intellectual tradition they consulted, every major theory of

Leaders of the day understood virtue as the very foundation upon which republican government is built and recognized it as a key factor in advancing the common good.<sup>298</sup>

Thomas Paine, America's revolutionary polemicist and best-selling eighteenth-century author, insisted that acting in the public good was not to act against the good of individuals. Rather, by acting for the good of everyone, each individual was served.<sup>299</sup> Paine also commented:

When it shall be said in any country . . . my poor are happy; neither ignorance nor distress is to be found among them; my jails are empty of prisoners, my streets of beggars; the aged are not in want; the taxes are not oppressive . . . ; when these things can be said, then may that country boast its constitution and its government.<sup>300</sup>

Paine believed that virtuous nations have special responsibilities for the well-being of the weak, poor, and vulnerable. He advocated, therefore, for such policies as progressive taxation, aid to the unemployed, and free public education.<sup>301</sup>

Throughout the following two centuries, as articulated by many prominent progressive thinkers, the ideas of public virtue and common good made a large sweep of the American social and political landscapes. Though battered in the uber-capitalist frenzy of recent decades, ideas extolling the common good do still exist today. As one of the foremost moral authorities of recent times, Pope John Paul II, put it, human beings should seek to pursue the common good—"[the] good of all and of each individual, because we are really responsible for all."<sup>302</sup> Not surprisingly, the ideas of public virtue and common good go hand-in-hand with the Golden Rule, an idea that has long been practiced in one form or another by all of the world's major religions.<sup>303</sup>

Earl Warren believed in these principles. A few years after leaving the Court, he commented in a *New York Times* opinion editorial that social welfare programs are "not an evil word" when hunger affects millions of Americans.<sup>304</sup> "When

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republican government by which they were influenced emphasized the importance of personal and public virtue.").

<sup>298</sup> *Id.* at 46.

<sup>299</sup> 1 Thomas Paine, *Dissertations on Government*, in *THE POLITICAL AND MISCELLANEOUS WORKS OF THOMAS PAINE* (London, R. Carlile, 1819).

<sup>300</sup> THOMAS PAINE, *THE RIGHTS OF MAN* 144-45 (London, Watts & Co. 1906).

<sup>301</sup> ERIC FONER, *TOM PAINE AND REVOLUTIONARY AMERICA* 219 (1976); JACK FRUCHTMAN, JR., *THOMAS PAINE: APOSTLE OF FREEDOM* 259 (1994).

<sup>302</sup> Michael Gerson, *Elevated by the Common Good*, WASH. POST (May 7, 2013), [https://www.washingtonpost.com/opinions/michael-gerson-elevated-by-the-common-good/2013/05/07/b58f8dd2-b683-11e2-92f3-f291801936b8\\_story.html](https://www.washingtonpost.com/opinions/michael-gerson-elevated-by-the-common-good/2013/05/07/b58f8dd2-b683-11e2-92f3-f291801936b8_story.html) [http://perma.cc/8XX3-BD86] (quoting Pope John Paul II, who died in 2005).

<sup>303</sup> See *supra* note 10 and accompanying text.

<sup>304</sup> CRAY, *supra* note 1, at 516 (quoting Warren).

hundreds of millions of dollars are given to bankrupt railroads, failing defense manufacturers, shipping interests and the like, the words ‘welfare’ or ‘relief’ are not used,” he noted ironically. “Instead such things are done to ‘strengthen the economy.’”<sup>305</sup>

Fortunately, traditional ideals of public virtue and concern for the common good have not disappeared entirely from twenty-first-century public discourse. As President Barack Obama stated in his second inaugural address on January 20, 2013,

[P]reserving our individual freedoms ultimately requires collective action . . . . For we, the people, understand that our country cannot succeed when a shrinking few do very well and a growing many barely make it . . . . We, the people, still believe that every citizen deserves a basic measure of security and dignity.<sup>306</sup>

The president essentially invoked the veil-of-ignorance paradigm in recognizing “that no matter how responsibly we live our lives, any one of us at any time may face a job loss, or a sudden illness, or a home swept away in a terrible storm.” Obama insisted that “[t]he commitments we make to each other through Medicare and Medicaid and Social Security, these things do not sap our initiative, they strengthen us. They do not make us a nation of takers; they free us to take the risks that make this country great.”<sup>307</sup>

Responding to Obama’s Rawlsian remarks,<sup>308</sup> conservative-leaning *New York Times* columnist David Brooks commented that “[Obama’s] critique was implicit. There has been too much ‘me’—too much individualism and narcissism, too much retreating into the private sphere. There hasn’t been enough ‘us,’ not enough communal action for the common good.”<sup>309</sup> And *Washington Post* columnist Michael Gerson suggested that “American politics would be elevated by a renewed commitment to the common good, . . . [making it] more civil, admirable and humane.”<sup>310</sup> By honoring basic concepts of human rights and public virtue, the

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<sup>305</sup> *Id.*

<sup>306</sup> President Barack Obama, Inaugural Address by President Obama at the United States Capitol (Jan. 21, 2013), <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama> [<http://perma.cc/V5WJ-8MVS>].

<sup>307</sup> *Id.*

<sup>308</sup> Indeed, a review of Obama’s speech in *The Economist* is titled, “Obama’s Rawlsian Vision.” *Equality of Opportunity: Obama’s Rawlsian Vision*, *ECONOMIST* (Feb. 19, 2013, 5:26 PM), <http://www.economist.com/blogs/democracyinamerica/2013/02/equality-opportunity> [<http://perma.cc/X3KQ-LN95>].

<sup>309</sup> David Brooks, *The Collective Turn*, *N.Y. TIMES* (Jan. 21, 2013), [http://www.nytimes.com/2013/01/22/opinion/brooks-the-collective-turn.html?\\_r=0](http://www.nytimes.com/2013/01/22/opinion/brooks-the-collective-turn.html?_r=0) [<http://perma.cc/M3QJ-9LYL>].

<sup>310</sup> Gerson, *supra* note 302.

Warren Court epitomized how a modern governmental institution can advance the worthy ideals of fairness and equal justice.

## CONCLUSION

It would be useful, in order to create a more fair, just, and humane America, to look to Rawlsian justice-as-fairness theory for guidance in judicial decisionmaking. In light of common law imperatives of *stare decisis*, an acceptable way for judges to proceed would be to adopt as a normative ideal the (essentially Rawlsian) equity-based fairness jurisprudence approach employed so effectively by the Warren Court in the years 1953–1969.

John Rawls reasoned that the justice-as-fairness principles may serve, at the very least, “as a guiding framework, which if jurists find it convincing, may orient their reflections, complement their knowledge, and assist their judgment.”<sup>311</sup> And it is proper for judges to look to political philosophy for guidance. Judges should not consider political philosophy as irrelevant, since they often behave as *de facto* political philosophers when interpreting the Constitution and imparting constitutional values. “Avoiding political philosophy means doing bad philosophy, not doing without it.”<sup>312</sup> And among existing political philosophies dealing with “justice” as a concept, Rawls’s theory is vastly superior to any other.<sup>313</sup>

Justice-as-fairness decisionmaking, as based primarily in the properly expansive Equal Protection and Due Process Clauses, is neither inappropriate nor arbitrary. Indeed, its approach of reasoning from behind a veil of ignorance is probably more objective than many decisions claiming to be based on the often uncertain or ambiguous “original intent” of long-deceased ancestors. The noted historian Joseph Ellis reports that the original intent doctrine “has always struck most historians of the founding era as rather bizarre.”<sup>314</sup> For, as historians, they understand how much deep disagreement there was at the Constitutional Convention and at the state ratifying conventions about the Constitution’s basic provisions. Original intent doctrine “requires you to believe that the ‘miracle at Philadelphia’ was a uniquely omniscient occasion when 55 mere mortals were permitted a glimpse of the eternal verities and then embalmed

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<sup>311</sup> Rawls, *supra* note 44, at 84.

<sup>312</sup> Griffin, *supra* note 14, at 779.

<sup>313</sup> *Id.* at 779–82.

<sup>314</sup> Joseph J. Ellis, *Immaculate Misconception and the Supreme Court*, WASH. POST (May 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/02/AR2010050202446.html> [<http://perma.cc/C6R4-DRHE>].

their insights in the document. Any professional historian proposing such an interpretation today would be laughed off the stage.” Ellis concluded, “That four sitting justices on the Supreme Court—Antonin Scalia, Clarence Thomas, John Roberts and Samuel Alito—claim to believe in it, or some version of it, is truly strange.”<sup>315</sup> And yet original intent reasoning continues to dominate constitutional discourse.

To illustrate how a judge might perform a Rawlsian justice-as-fairness analysis, consider a court’s determination of probable cause for issuing a warrant to search the home of a person suspected of (and later charged with) committing a crime, such as a home robbery. Such a determination involves the interests of three parties—the defendant, the victim, and society. From behind the veil of ignorance, the judge places herself in the position of each of the three parties arguing separately for just consideration. From the perspective of the defendant, the invasion of privacy is at least upsetting—and even shocking if the defendant is truly innocent. The victim, for her part, would want the police not to be unnecessarily hampered as they search for evidence of the robbery. Finally, society wants to know that the neighborhood is safe from criminals but is also concerned about overzealous policing leading to excessive intrusions on home privacy. Proceeding in this way, the judge would then ask whether “a rational, self-interested person adjudicating this case [would] find the amount of evidence presented . . . sufficient to justify . . . [the search] regardless of whether they would turn out later to be the victim of the crime, the person searched, or the neighbor down the street? If yes, probable cause exists.”<sup>316</sup>

It is important to note, however, that judges will differ even when applying Rawlsian analysis. Judges are human beings, after all. Even so, the justice-as-fairness approach does provide a useful framework for courts seeking just outcomes.<sup>317</sup> Ultimately, justice is served through such a process, which bases the probable cause determination on the balancing of personal and societal interests in a way that seeks to maximize the common good. And not insignificantly, judges may accordingly find that their opinions “weather the test of time” by applying original position analysis.<sup>318</sup>

Rawls believed that “[h]istorically one of the main defects of constitutional government has been the failure to insure the

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<sup>315</sup> *Id.*

<sup>316</sup> Antkowiak, *supra* note 43, at 598.

<sup>317</sup> *Id.* at 599; *see also, e.g.,* Griffin, *supra* note 14, at 716 (stating, “Rawls’s theory remains the best and most relevant theory of justice available”).

<sup>318</sup> Antkowiak, *supra* note 43, at 605-06.



fair value of political liberty,”<sup>319</sup> or the right to participate equally, fully, and meaningfully in a democratic society. “Disparities in the distribution of property and wealth that far exceed what is compatible with political equality have generally been tolerated by the legal system.”<sup>320</sup> This is a major problem in America, where today, income inequality is higher than at any time since the early 1900s and where money plays such an outsized role in the political process.<sup>321</sup> As Justice Louis Brandeis once warned in the decades following the last Gilded Age, “[w]e can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can’t have both.”<sup>322</sup>

It should be emphasized that, according to Rawls, “full and meaningful participation” does not require absolutely equal participation. The second principle of justice permits inequalities in economic goods, so it follows that not every person, in practical terms, has the same opportunity to participate. Absolute equality is not the goal; rather, the goal is to “take whatever steps we can to ensure that everyone has a fair chance to hold public office, to be informed about political issues, to place items on the public agenda, and generally to influence the political process.”<sup>323</sup>

There is no doubt that Supreme Court decisions since the Warren Court have failed to meet a standard of “taking whatever steps we can to ensure that everyone has a fair chance” to participate meaningfully in the political process. First, money in politics is out of control. The wealthy enjoy a massively disproportionate voice and role in the political process, as enabled by the Court’s decidedly non-Rawlsian, overly broad, and formalistic interpretations of the First Amendment’s protection of free expression—first in 1976 in *Buckley v. Valeo*,<sup>324</sup> and most

<sup>319</sup> Griffin, *supra* note 14, at 770 (quoting JOHN RAWLS, A THEORY OF JUSTICE (1971)).

<sup>320</sup> *Id.*

<sup>321</sup> The sheer scale of wealthy donors’ outsized contributions vis-à-vis those of average citizens is illustrated by the following figures from the 2012 elections: “The top 32 Super PAC donors, giving an average of \$9.9 million each, matched the \$313.0 million that President Obama and Mitt Romney raised from all of their small donors combined—that’s at least 3.7 million people giving less than \$200.” Furthermore, “[n]early 60% of Super PAC funding came from just 159 donors contributing at least \$1 million. More than 93% of the money Super PACs raised came in contributions of at least \$10,000—from just 3,318 donors, or the equivalent of 0.0011% of the U.S. population,” and “[i]t would take 322,000 average-earning American families giving an equivalent share of their net worth to match the Adelsons’ \$91.8 million in Super PAC contributions.” BLAIR BOWIE & ADAM LIOZ, BILLION DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS (2013), <http://www.demos.org/sites/default/files/publications/billion.pdf> [<http://perma.cc/WT2X-ZXLC>] (last visited Mar. 4, 2016).

<sup>322</sup> Louis D. Brandeis Quotes, BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/l/louisdbra140392.html> [<http://perma.cc/B9BR-EVPK>] (last visited Mar. 4, 2016).

<sup>323</sup> Griffin, *supra* note 14, at 770.

<sup>324</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

recently in 2010 in *Citizens United v. FEC*.<sup>325</sup> Rawls, who advocated for the independence of political parties from private wealth, campaign and election public financing, caps on the amount of contributions to political campaigns, and government subsidies for full discussion of public issues, was highly critical of *Buckley* for striking down campaign finance legislation.<sup>326</sup>

Second, for millions of citizens, the fair chance for meaningful participation in the political process has been severely compromised by the Roberts Court's recent gutting of the Voting Rights Act of 1965 in *Shelby County v. Holder*,<sup>327</sup> a case demonstrating a disturbing lack of concern for the corollary to the one person, one vote principle that states should make every effort to enable and encourage all eligible voters to vote. In *Shelby County*, the Court struck down the Act's formula requiring states and localities with a history of discrimination to receive preapproval from the Justice Department before making changes to their voting laws. (This despite the fact that the Act had been renewed by Congress in 2006 by a vote of 390-33 in the House and 98-0 in the Senate—rare agreement among Democrats and Republicans in a highly partisan Congress.) In short, far from seeking to enable and encourage all eligible voters to vote, *Shelby County* instead made it much easier for jurisdictions that have previously discriminated to discriminate once again—as demonstrated by the changes made by a number of the previously affected jurisdictions to re-impose discriminatory voting practices shortly after the decision was announced.<sup>328</sup>

The decisions of the Burger, Rehnquist, and Roberts Courts are placed in particularly harsh light when compared to those of the Warren Court half a century ago.<sup>329</sup> The Warren

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<sup>325</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010); see *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). In these cases, the Court has favored the wealthy (who often have copious funds to invest) by conferring enhanced "personhood" status on corporations and other organizations, to which skeptics are said to wryly reply: "[A] corporation will never truly be a citizen until you can execute one in Texas." Timothy Egan, *The Conscience of a Corporation*, N.Y. TIMES (Apr. 3, 2015), [http://www.nytimes.com/2015/04/03/opinion/timothy-egan-the-conscience-of-a-corporation.html?emc=edit\\_th\\_20150404&nl=todaysheadlines&nliid=51212577](http://www.nytimes.com/2015/04/03/opinion/timothy-egan-the-conscience-of-a-corporation.html?emc=edit_th_20150404&nl=todaysheadlines&nliid=51212577) [<http://perma.cc/9DL6-W8GD>].

<sup>326</sup> Griffin, *supra* note 14, at 770.

<sup>327</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

<sup>328</sup> See, e.g., Kara Brandeisky et al., *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 4, 2014, 12:31 PM), <http://www.propublica.org/article/voting-rights-by-state-map> [<http://perma.cc/F52M-KSHZ>] ("Two months after . . . [*Shelby County* was handed down], North Carolina cut early voting and eliminated same-day registration"; "[s]even [former] preclearance states have announced new restrictions since [*Shelby County*];"; "Virginia has purged 38,000 voters, and Kansas has suspended registration for 17,500.").

<sup>329</sup> New York University professor Burt Neuborne captures well the frustration with the post-Warren Supreme Court in a letter to the *New York Times*:

Court *did* in fact attempt to meet a standard of “taking whatever steps we can to ensure that everyone has a fair chance” to participate meaningfully in the political process.<sup>330</sup> Dubbed the “fair politics” institution by some,<sup>331</sup> the Warren Court played a vital role in guaranteeing the political liberty of all Americans with its landmark “one person, one vote” reapportionment cases. Indeed, “Chief Justice Warren claimed the reapportionment decisions as his Court’s greatest accomplishment because more than any other decisions . . . they attempted to create a fair society in which everyone has an equal chance . . . . [P]olitics should provide ‘fair and effective representation for all citizens.’”<sup>332</sup>

Were they to adopt a Rawlsian-based justice-as-fairness approach to the campaign finance and voting rights cases, the Justices in the majority in *Citizens United* and *Shelby County* (Chief Justice John Roberts and Justices Samuel Alito, Anthony Kennedy, Antonin Scalia, and Clarence Thomas) would imagine from behind the veil-of-ignorance that they might themselves be members of an at-risk minority or other group whose votes are in

Fifty years of Supreme Court tinkering with our political system has resulted in a democracy so dysfunctional that no rational person would choose it.

The people, through their elected representatives, gave us an effective Voting Rights Act to protect minority voters. The Supreme Court told us that we don’t need it anymore. The people gave us a campaign finance law limiting the expansive political power of the rich. The Supreme Court told us that unlimited campaign spending by the 1 percent doesn’t corrupt the democratic process.

The people gave us a practical way to allow underfunded candidates to compete with rich ones. The Supreme Court told us that it was unfair to the rich. The people walled off the vast trove of corporate wealth from our elections. The Supreme Court told us that unlimited corporate electioneering was good for us.

The people drew legislative lines to help racial minorities recover from centuries of political exclusion. The Supreme Court told us that it was a dangerous form of racism.

But when today’s politicians entrench themselves in power by putting hurdles in the way of poor people voting, gerrymandering district lines to assure the re-election of incumbents, and stacking the electoral deck in favor of the majority party, the Supreme Court just stands by.

. . . .

. . . Poor people have to jump through hoops to vote. The party in power controls the outcome in too many legislative elections. And the superrich have turned too many of our elected representatives into wholly owned subsidiaries, and most of our elections into auctions. Madison would weep.

Burt Neuborne, *Letter to the Editor: Invitation to a Dialogue: Democracy Gone Awry*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/opinion/invitation-to-a-dialogue-democracy-gone-awry.html> [<http://perma.cc/G7HP-KF3W>].

<sup>330</sup> Griffin, *supra* note 14, at 770.

<sup>331</sup> Anderson & Cain, *supra* note 85, at 43.

<sup>332</sup> *Id.*

danger of being compromised by questionable districting practices and overly onerous registration requirements. Or they might be part of the vast majority of Americans who do not have great wealth or power, but who nonetheless care deeply about the issues confronting the nation. When such persons see hurdles being erected that make it more difficult for the less advantaged to vote and the massively outsized influence that those with great wealth or power are able to exert (with no possibility that they will ever be able to come close to having that sort of voice), they justifiably believe that the system is rigged. Situated among the at-risk individuals, each Justice, acting in his own self-interest, presumably would opt for striking down impediments to voting and upholding more stringent limits on campaign finance.

A justice-as-fairness approach would enable the judiciary (not least the U.S. Supreme Court) to impartially address the social and political realities of the twenty-first century—a substantial improvement in administering justice for an institution too-often tarnished by the taint of bias and privilege. By combining elements of both the Supreme Court’s jurisprudence under Chief Justice Warren and the political theorist John Rawls’s groundbreaking “justice as fairness” theory, it is possible to devise an improved approach to judicial decisionmaking that would better serve America’s core principles of liberty and equal justice for all.

